87-1860

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1987

WILLIAM G. MILLIKEN, et al,
Appellants,

v.

MICHIGAN ROAD BUILDERS
ASSOCIATION INC., et al,
Appellees.

On Appeal from the United States
Court of Appeals for the Sixth Circuit

JURISDICTIONAL STATEMENT
AND APPENDIX

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record

Brent E. Simmons
Assistant Attorney General
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-6434

Attorneys for Appellants

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QUESTIONS PRESENTED

I

WHETHER THE SIXTH CIRCUIT'S FINDING THAT THE STATE OF MICHIGAN FAILED TO "PROVE" IT HAD INVIDIOUSLY DISCRIMINATED AGAINST MINORITIES AND WOMEN IN STATE CONTRACTING, CONFLICTS WITH THIS COURT'S "SUFFICIENT EVIDENCE" STANDARD UNDER THE EQUAL PROTECTION CLAUSE IN JUSTIFYING A REMEDIAL, AFFIRMATIVE ACTION PROGRAM EMPLOYING RACIAL, ETHNIC AND GENDER CLASSIFICATIONS.

II

WHETHER A STATE MUST MAKE SEPARATE FINDINGS OF DISCRIMINATION AGAINST DISTINCT RACIAL AND ETHNIC GROUPS BEFORE EACH SUCH GROUP MAY BE INCLUDED IN A REMEDIAL, AFFIRMATIVE ACTION PROGRAM EMPLOYING RACIAL AND ETHNIC CLASSIFICATIONS.

PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

Plaintiffs

1. Michigan Road Builders Association Inc., a Michigan corporation
2. Michigan Chapter Associated General Contractors of America, Inc., a Michigan corporation
3. Michigan State Chamber of Commerce, a Michigan corporation
4. Michigan Asphalt Paving Association, Inc., a Michigan corporation
5. Michigan Concrete Paving Association, a Michigan corporation
6. Michigan Mineral Resources Association, Inc., a Michigan corporation
7. Michigan Ready Mixed Concrete Association, a Michigan corporation
8. Michigan Chapter National Electrical Contractors Association, Inc., a Michigan corporation
9. Michigan Plumbing & Mechanical Contractors Association, Inc., a Michigan corporation
10. Michigan Chapter Sheet Metal and Air Conditioning Contractors National Association, a Michigan corporation
11. Ajax Paving Industries, Inc., a Michigan corporation
12. Argersinger-Morse Construction Company, a Michigan corporation
13. Bacco Construction Company, a Michigan corporation

14. Bemis & Son, Inc., a Michigan corporation
15. Brown Brothers, Inc., a Michigan corporation
16. C-Way Construction Company, a Michigan corporation
17. Central Paving Company, a Michigan corporation
18. Cunningham-Gooding, a Michigan corporation
19. Edison Company, L.W., a Michigan corporation
20. Eisenhour Construction Company, Inc., a Michigan corporation
21. Forsbert, Inc., T.A., a Michigan corporation
22. Gilliland Construction Company, a Michigan corporation
23. Hebert Construction Company, a Michigan corporation
23. Hicks Company, a Michigan corporation
24. Kegle Construction Company, a Michigan corporation
26. Lamb Company, L.W., a Michigan corporation
27. MacLean Construction Company, a Michigan corporation
28. Midwest Bridge Company, a Michigan corporation
29. Molesworth Contracting Company, a Michigan corporation
30. Reith-Riley Construction Company, Inc., a Michigan corporation
31. Sargent Inc., B.H., a Michigan corporation
32. Schworm, Inc., a Michigan corporation
33. Snowden, Inc., a Michigan corporation

34. Spartan Asphalt Paving Company, a Michigan corporation
35. Toebe Construction Company, Walter, a Michigan corporation
36. Yerington Company, John G., a Michigan corporation

Defendants

1. William G. Milliken, as Governor of the State of Michigan
2. Department of Management and Budget of the State of Michigan
3. Gerald H. Miller, as Director of the Department of Management and Budget
4. Department of Transportation of the State of Michigan
5. John P. Woodford, as Director of the Department of Transportation

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JURISDICTIONAL STATEMENT

Appellants, William G. Milliken, et al, (hereinafter "the State of Michigan") appeal from the November 25, 1987 judgment of the United States Court of Appeals for the Sixth Circuit, which held that Michigan's Public Act 428 of 1980 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Public Act 428 provides that 7% of all state government expenditures for the procurement of goods, services and construction shall be awarded to minority owned businesses and 5% to women owned businesses.

OPINIONS BELOW

The November 25, 1987 opinion of the Sixth Circuit in *Michigan Road Builders Association, Inc, et al v William G. Milliken, et al,* is reported at 834 F2d 583 (CA 6, 1987). App. 2a. The February 23, 1988 order of the Sixth Circuit denying the Petition for Rehearing and Suggestion for Rehearing En Banc appears at App. 44a.

The February 10, 1986 opinion and order of the District Court is reported at 654 F Supp 3 (ED Mich, 1986) and appears at App. 37a.

The August 24, 1984 order of the Sixth Circuit dismissing the first appeal for lack of jurisdiction is reported at 742 F2d 1456 (CA 6, 1984) and appears at App. 83a.

The August 12, 1983 opinion and order of the District Court is reported at 571 F Supp 173 (ED Mich, 1983) and appears at App. 45a.

JURISDICTION

Appellees, the Michigan Road Builders Association, Inc., et al, filed suit in federal district court in July 1981, alleging that Public Act 428, on its face, violates their federal constitutional and civil rights under the Fourteenth Amendment and 42 USC §§ 1981, 1983, 2000d and 2000e.

The decision of the Sixth Circuit declaring Michigan's Public Act 428 of 1980 unconstitutional, reversing the district court's ruling and remanding for entry of judgment in favor of Respondents, was issed on November 25, 1987. (App. 2a). The State of Michigan's petition for rehearing and suggestion for rehearing en banc, timely filed on December 9, 1987, was denied on February 23, 1988. (App. 44a).

The notice of appeal was filed in the United States Court of Appeals for the Sixth Circuit on May 3, 1988. (App. 84a).

This appeal has been docketed within 90 days of the denial of rehearing below. 28 USC § 2101(c).

The jurisdiction of the Court is invoked pursuant to 28 USC § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves: (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (App. 85a); and (2) Michigan's Public Act 428

of 1980, MCL 450.771 *et seq*; MSA 3.540(51) *et seq* (App. 86a).[1]

STATEMENT OF THE CASE

"A state legislature has the prerogative and even the constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination."[2] In this case, it is not disputed "that Public Act 428 (of 1980) was designed to ameliorate the effects of past discrimination against minorities and women competing for contracts to supply the state with goods and services."[3]

During the early 1970's, the State of Michigan recognized the underutilization of minority and women owned business in state contracting. District Court opinion at 178 (App. 55a-56a). The state first attempted to address the problem by easing bonding requirements on small construction projects. *See* Public Act 351 of 1972, MCL 129.201 *et seq*; MSA 5.2321(1) *et seq*; *see also* District Court opinion at 178 (App. 56a). The state also created a Division of Minority Business Enterprise to provide mana-

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[1]

Appellees also filed suit under federal civil rights statutes, 42 USC §§ 1981, 1983, 2000d and 2000e. Noting that the Appellees had abandoned their claim under 42 USC § 2000e *et seq* on appeal, and that the protections afforded by the other statutes were "coextensive" with the Fourteenth Amendment, the Sixth Circuit analyzed Public Act 428 only under Fourteenth Amendment equal protection standards. 834 F2d at 585 n 3 (App. 5a).

[2]

Michigan Road Builders Association, Inc, et al v Milliken, et al, 834 F2d 583, 586, n.4 (CA 6, 1987), citing *Wygant v Jackson Board of Education*, 476 US 267 (O'Connor, J. concurring). (Emphasis in the original) (App. 6a).

[3]

Id.

gerial and financial assistance to minority business. *See* Public Act 165 of 1975, MCL 125.1221 *et seq*; MSA 3.540(31) *et seq*. Later the State adopted a modest, nonbinding goal of one percent minority business participation in state contracting, which it failed to meet. *Infra* at 7.

None of these measures corrected the under representation of minority and women owned businesses in state contracting.

A. Statutory Background

A 1974 study commissioned by the State of Michigan[4] found that out of 437 million dollars in state contracts for goods and services, only an estimated $225,000—or 0.05% of the total—had been awarded to minority owned businesses.[5] Yet, based on 1969 U. S. Economic Census data, there were more than 8,000 minority owned businesses in Michigan, with gross receipts of nearly $320 million and distributed over more than 50 construction, man-

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[4]

"A Public Procurement Inventory on Minority Vendors State of Michigan," by Urban Markets Unlimited, Milwaukee, Wisconsin, July 1974. *See* District Court opinion at 179-181 (App. 56a-62a).

[5]

The "Urban Markets Study" defined a minority owned business enterprise as "a business in which one or more minority persons own or control at least 50 percent of a given enterprise. Such persons include Black Americans, American Indians, Spanish-Americans, Oriental-Americans, Eskimos, and Aleuts." P. iv (footnote).

ufacturing, sales and service categories which matched state purchasing requirements.[6]

The 1974 study also included a survey of state purchasing officials, which revealed "unfounded negative attitudes" against minority vendors.[7] The study noted that there was "a sizeable number of competent minority businesses in the State" and that "to rationalize that the lack of success in minority procurement is based upon minorities incompetency and non-responsiveness is not supported by the evidence.[8]

The study also noted that state agencies did not actively seek new sources of vendors, and that "the key to purchasing success with minority vendors is the will to do business." The study concluded with the finding that "*State procurement practices are not equitable in the treatment of minority vendors.*" (Emphasis in the original.)[9]

In 1976 it was reported that minorities represented about 14% of the total population of Michigan, and owned

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[6]

According to 1977 U.S. Economic Census data, the number of minority owned businesses in Michigan increased to 10,840 with gross receipts of nearly $580 million. There were twice as many women owned businesses (21,727), with gross receipts of nearly $1.5 billion. *See* 1977 Survey of Minority Owned Business Enterprise (Table 2b) and 1977 Economic Census Women Owned Businesses (Table 2), Selected Statistics by Geographic Division, State and Industry Division (Michigan), U. S. Bureau of the Census.

[7]

District Court opinion at 179 (App. 57a).

[8]

Id., at 181 (App. 61a).

[9]

Id. (App. 62a).

about 6% of the businesses in the five major industrial sectors.[10]

Although nearly 6% of all businesses in the State were minority owned and nearly 12% were women owned, each group received only one percent or less of annual state contracting expenditures.[11]

In 1975 a committee of representatives from the Governor's office, the Office of Economic Expansion and the Department of Management and Budget (DMB) met to make recommendations to the Governor on how "to remove the inequities faced by minorities in receiving state contracts."[12]

A Small Business Task Force was created and public hearings were held in December 1975. The Task Force found that "the participation of minority business in state procurement is minimal" and that "purchase patterns of state procurement appear to be of longstanding and difficult for small and minority business enterprise to influence."[13]

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[10]

"Testimony Given Before Senate State Affairs Committee on Senate Bill No. 1461." Record Exhibit 19A(26); Court of Appeals opinion at 594 n.13 (App. 26a).

[11]

Legislative Analyses, Record Exhibits 19A(17), 19A(18), 19A(20), 49.

[12]

Record Exhibit 19A(26), *supra*, n. 10.

[13]

"Task Force on Small Business Participation in State Purchasing—Final Report," March 1976. Record Exhibit 19(C); *see also* District Court opinion at 183 (App. 67a).

The report also found that "the state does not appear to adequately require contractors, intending to subcontract, to solicit bids from small and minority subcontractors."[14]

In 1977, the Small and Minority Business Procurement Council reported that "Of this $356 million available for procurement expenditure in 1976-77, departments planned to spend $81 million (23 percent) with small, *non-minority* business firms and $4 million (1 percent) with *minority-owned* businesses".[15] (Emphasis added). By the end of the fiscal year, however, the dollar goal for *non-minority* small businesses had been *exceeded* by nearly $12.8 million, while actual expenditures for small *minority-owned* businesses *fell short* by $230,580.[16]

Between 1975 and 1977, the Michigan Senate considered three separate set aside bills—SB 885 in 1975, SB 1461 in 1976 and SB 10 in 1977. While extensively analyzed and debated, none of those earlier set aside proposals were enacted. *See* Court of Appeals opinion at 591 n.9 (App. 18a).

On March 6, 1978, the Michigan House adopted House Resolution No. 361, which created a special committee "to monitor and investigate affirmative action programs in State government." 1978 Journal of the House 543, 702. Resolution No. 361 declared, in part:

> Whereas, Recent statistics show that . . . some State departments and agencies have been uncooperative

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[14] *Id.*

[15] "Small & Minority Business Procurement Council, First Annual Report" (Fiscal Year 1976-77). Record Exhibit 19(D).

[16] *Id.* Contrary to the Court of Appeals' finding, therefore, MBEs were unable to compete for state contracts for reasons *other than* their size. *See* App 20a. Race was the only remaining factor.

> in complying with equal opportunity laws in the purchase of services; and
>
> * * *
>
> Whereas, in falling short of its responsibilities, State government is setting a poor example for local governments and private employers who have been less than diligent in implementing affirmative action programs. Indeed, Michigan's record in pursuing affirmative action goals in State hiring and purchase of services is intolerable and should be scrutinized by the Michigan Legislature . . . .

In May 1978, the Michigan Department of Civil Rights found that employee status reports submitted by state contractors "have consistently shown minorities and women to be excluded, underemployed or concentrated in stereotyped positions.[17]

In March 1979 Michigan House Bill 4335 was introduced and finally passed both houses of the legislature in December 1980, after more than a year and a half of debate and amendments. It was signed by the Governor on January 13, 1981 as Public Act 428.

The Act incorporates phased-in goals of up to 7% of all state contracting expenditures to be awarded to minority owned businesses and 5% to women owned businesses.[18]

Significantly, the 7% and 5% goals were in line with the proportions of minority and women owned businesses in

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[17]

"A Report to the Governor on Implementation of Executive Directive 1975-76," May 15, 1978 Michigan Department of Civil Rights. Record Exhibit 19E at 9.

[18]

See District Court opinion at 184 n.5 (App. 70a).

the state. They were not based on the proportions of minorities (about 14%) and women (about half) in the general population. *Compare J Edinger & Son v City of Louisville,* 802 F2d 213 (CA 6, 1986).

While the Michigan legislature was also mindful of the Supreme Court's decision in *Fullilove v Klutznick*, 448 US 448 (1980), it did not adopt *pro forma* the federal 10% set aside for minority owned business approved in that decision.[19]

B. Proceedings Below

Plaintiffs filed suit for declaratory and injunctive relief in July 1981, alleging that Public Act 428, on its face, violates the Equal Protection Clause of the Fourteenth Amendment and federal civil rights statutes, including 42 USC §§ 1981, 1983, 2000d and 2000e. The State of Michigan denied the allegations.

Cross motions for summary judgment were filed in November 1981. On August 12, 1983, the District Court issued a memorandum opinion and order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment. (App. 45a). Plaintiffs appealed.

On August 24, 1984, the Sixth Circuit granted the defendants' motion to dismiss the appeal for lack of jurisdiction on grounds that the District Court had not resolved plaintiffs' claims against the Michigan Department of Transportation (MDOT). (App. 83a).

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[19]

See Record Exhibits 19A(17) and 49, *supra*, n. 11.

On remand, the District Court held in February 1986 that Public Act 428 authorized MDOT to use set asides on exclusively state funded contracts. (App. 37a). Plaintiffs again appealed.

The cause was argued on May 4, 1987. Supplemental briefs were subsequently filed in light of the Ninth Circuit's decision in *Associated General Contractors v City and County of San Francisco*, 813 F2d 922 (CA 9, 1987).

In a divided opinion dated November 25, 1987, Sixth Circuit Judges Krupansky and Engel reversed the District Court and ruled that Public Act 428 is unconstitutional. Chief Judge Lively dissented, viewing the Act as constitutional and voting to affirm the District Court's decision. (App. 2a).

The State of Michigan's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 23, 1988. (App. 44a).

The Sixth Circuit's majority opinion found that the District Court erroneously held that the State of Michigan was only required to show a "significant" rather than a "compelling" governmental interest in enacting Public Act 428.[20]

The majority also found that the state could not "admit" prior discrimination[21] and that it had relied upon "certain conclusionary historical resumes of unrelated legislative enactments, proposed enactments, executive reports and a state funded private study," which were not "probative of

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[20] Court of Appeals opinion at 587 (n. 5), 588 (App. 10a, 12a).

[21] *Id.*, at 590-1, n. 7 (App. 17a).

discrimination."[22] The majority specifically found that "(t)he evidence *does not prove* that the State of Michigan invidiously discriminated against racial and ethnic minorities in awarding state contracts."[23] (Emphasis added).

The majority opinion also held that "(a) finding of prior purposeful discrimination against members of *each* of these favored minority groups *is required* before state and local governments are permitted to remedy alleged discrimination by the enactment of laws embodying racial and ethnic distinctions," citing *Wygant*, 106 S Ct at 1852 n. 13[24] (Emphasis added).

In his dissent, Chief Judge Lively notes that the Supreme Court has "yet to reach a consensus on the appropriate constitutional analysis" in affirmative action cases.[25] He adds, nevertheless, that "(t)he majority concedes, as it must, that the State of Michigan has a *compelling* interest in eliminating race and gender discrimination from its procedures for awarding public contracts."[26] (Emphasis added).

The dissent further notes that the "evidence was sufficient for the Legislature to make a finding of past intentional discrimination," and that that finding of fact by the

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[22] *Id.*, at 590, 593, 594 (App. 17a, 23a, 26a).

[23] *Id.*, at 594 (App. 26a).

[24] *Id.*, at 594-5 n. 14 (App. 27a).

[25] *Id.*, at 596 (App. 31a), citing *United States v Paradise*, 107 S Ct 1053, 1064 (1987).

[26] *Id.*

District Court was not clearly erroneous.[27] In addition, the dissent continues, the majority failed "to give the deference that a federal court should give to a state legislature's findings" and that the level of findings required by the majority "has not heretofore been required."[28]

THE QUESTIONS ARE SUBSTANTIAL

At issue in this case is the constitutionality of a remedial, affirmative action state statute which employs racial and gender classifications.

Although this Court has yet to reach consensus on the appropriate constitutional analysis under the Equal Protection Clause in such cases, the State of Mcihigan—like many other state and local governments—relied on the court's plurality and concurring opinions in *Fullilove v Klutznick*[29] in both structuring *and enacting* Public Act 428 of 1980,[30] following nearly a decade of experimentation, extensive study and exhaustive debate.[31]

State and lower federal courts have also relied upon *Fullilove* in upholding the constitutionality of voluntary affirmative action programs of state and local govern-

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[27]

Id., at 597-8 (App. 34a).

[28]

Id.

[29]

448 US 448 (1980).

[30]

See Michigan House and Senate legislative analyses citing *Fullilove* as authority for passage of Public Act 428. Record Exhibits 19A(17) and 49.

[31]

See District Court opinion at 174, 178-184 (App. 47a, 55a-69a).

ments,[32] including the U. S. District Court in this case.[33]

In *Wygant v Jackson Board of Education*,[34] this Court also followed *Fullilove* in its several opinions.[35] Thus, *Wygant* did not change "all the previously accepted standards for judging the validity of affirmative action programs of governments and governmental units."[36]

I. THE SIXTH CIRCUIT ERRONEOUSLY CONSTRUES THE CONSTITUTIONAL STANDARDS UNDER WYGANT AS FAR MORE STRINGENT THAN THOSE UNDER *FULLILOVE*.

In 1983, the Sixth Circuit upheld the State of Ohio's minority business enterprise (MBE) "set aside" in state contracting on the basis of *Fullilove*. See *Ohio Contractors Association v Keip*, 713 F2d 167 (CA 6, 1983). In this case,

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[32]

See e.g., *Southwest Washington Chapter, Nat'l Electric Contractors Assoc v Pierce County*, 100 Wash 2d 109; 667 P2d 1092, 1098-1100 (1983); *Associated General Contractors of Cal, Inc. v City and County of San Francisco*, 619 F Supp 334, 339 (ND Cal 1985), *aff'd in part rev'd in part* 813 F2d 922 (1987); *South Florida Chapter, Associated Gen'l Contractors v Metropolitan Dade County*, 723 F2d 846, 850-2 (CA 11, 1984), *cert den* 469 US 871 (1984); *Ohio Contractors Ass'n v Keip*, 713 F2d 167, 170 (CA 6, 1983).

[33]

District Court opinion at 175-6, 187-190 (App. 49a-53a, 75a-82a).

[34]

476 US 267; 106 S Ct 1842 (1986).

[35]

Id., 106 S Ct at 1846 (Powell, J., for the Court), 1852 (O'Connor, J., concurring)

[36]

Court of Appeals opinion at 595 (Lively, C.J., dissenting) (App. 29a).

however, the Sixth Circuit rejects Michigan's very similar set aside program,[37] primarily on the basis of *Wygant*.[38]

A. *Wygant* Does Not Require States To Prove Themselves Guilty of Indivious Discrimination.

The Sixth Circuit's majority opinion holds that the Michigan legislature was required to "*prove* that the State of Michigan invidiously discriminated against racial and ethnic minorities in awarding state contracts." (Emphasis added). Court of Appeals opinion at 594 (App. 26a). The majority found that "the Michigan legislature had little, if any, *probative evidence* before it that would warrant a finding" that the State had discriminated in awarding contracts. *Id.*

The majority opinion completely ignores the finding of the Urban Markets study that minority vendors were not equitibly treated in state procurement, and the statistical disparities between the percentages of minority and women owned businesses in the State and the low proportion of contracts they received.

"While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers *to prove* that they actually discriminated against women or minorities." *Johnson v*

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[37] Michigan relied on a "backdrop" of historical evidence of prior discrimination similar to Ohio's in enacting Public Act 428, including executive orders, task force reports, special studies, legislative hearings, investigations and resolutions, and public hearings. *Compare* Statutory Background, supra, and District Court opinion at 178-184 (App. 55a-69a) with *Ohio Contractors*, 713 F2d at 170-1.

[38] Court of Appeals opinion at 588-9 (App. 10a-13a).

Transportation Agency, Santa Clara County, 107 S Ct 1442, 1463 (1987) (O'Connor, J., concurring). (Emphasis added).

A challenge to an affirmative action plan does not automatically impose upon a public agency "the burden of convincing the court of its liability for prior unlawful discrimination." *Id.*, citing *Wygant*, 106 S Ct at 1856. "(N)or does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld." *Id.*

The Sixth Circuit thus errs in holding that Michigan was required to "prove" it had discriminated before enacting Public Act 428. Moreover, the Sixth Circuit also errs in applying judicial standards of review to a legislative determination. See *Fullilove*, 448 US at 478 (Burger, C.J.) and 448 US at 502-3 (Powell, J., concurring).

The State need only have "sufficient evidence to justify the conclusion that there has been prior discrimination," or "a firm basis for believing that remedial action is required." *Wygant v Jackson Board of Education*, 106 S Ct 1842, 1848 (1986) (Powell, J.) and 106 S Ct at 1853 (O'Connor, J., concurring). That standard was followed by the district court in this case. (App. 75a).

Evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises will support a legislative determination that remedial action is warranted. See *Fullilove, supra*, 448 US at 477-8 (Burger, C.J.). Statistical disparities sufficient to support a *prima facie* case of discrimination, would also lend a compelling basis for a voluntary affirmative action

program "to remedy *apparent* prior discrimination." See *Wygant*, 106 S Ct at 1856 (O'Connor, J., concurring).[39]

The evidence in this case established that there had long been a substantial disparity between the percentages of minority and women owned businesses in the State and the percentage of State contracting expenditures they received. But the evidence also established a firm basis for believing that state contracting officials had "unfounded negative attitudes" against minority contractors and that prime contractors on state projects discriminated against minorities and women in the awarding of subcontracts.

In reviewing the evidence, the Sixth Circuit concluded that the State of Michigan was "admitting" prior discrimination, and then rejected that "admission" as having little relevance. Court of Appeals' opinion at 590-1, n. 7 (App. 17a). The State, however, made no such admission. The evidence of "apparent prior discrimination"[40] before the Sixth Circuit was offered to establish the State's firm basis for believing that remedial action was necessary, and not as an "admission."

To require states to "prove" that they had in fact discriminated would be at odds with this Court's and Congress' emphasis on voluntary remedial efforts to eliminate all vestiges of discrimination. *Wygant*, 106 S Ct at 1855 (O'Connor, J., concurring). Voluntary compliance by the

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[39]

A six-member majority of the Court appears to support the *prima facie* standard in constitutional cases. See *Johnson v Transportation Agency, Santa Clara County*, 107 S Ct 1442, 1452 (1987). Five of the six Justices, however, would apply the less stringent "manifest imbalance" standard in Title VII challenges to voluntary affirmative action plans. *Id.*

[40]

Wygant, 106 S Ct at 1856 (O'Connor, J., concurring).

State is "doubly important" because of the example it sets "and because remediation of governmental discrimination is of unique importance." *Id.*

The Michigan legislature recognized its responsibilities to set such an example and to take remedial action. *See* House Resolution No. 361, *supra* at 7.

B. The District Court's Finding That There Was Sufficient Evidence of Prior Discrimination Is Not Clearly Erroneous Under *Wyant*.

It was the responsibility of the District Court to make a "factual determination" that the State had a sufficient basis in evidence for the conclusion that remedial action was necessary. *Wygant*, 106 S Ct at 1848 (Powell, J.). The District Court found that "there was sufficient evidence before the Legislature to make a finding of past intentional discrimination." (App. 75a). That finding of fact was not "clearly erroneous." (App. 34a, Lively, C.J., dissenting).

The District Court also found that the Michigan legislature had relied on far more than simply evidence of "societal" discrimination. District Court opinion at 185 (App. 72a). The Sixth Circuit's finding that "at best, the evidence suggested that societal discrimination had afforded the obstacle" to MBEs, ignores much of the record evidence. *See* Court of Appeals opinion at 594 (App. 26a); *see also* dissenting opinion at 598 (App. 34a).

Furthermore, the District Court did not commit reversible error in holding that the State must demonstrate a "significant" rather than a "compelling" governmental interest in remedying the effects of past discrimination. See App. 10a, n. 5. This Court has agreed that "whatever the formulation employed, remedying past or present racial

discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant*, 106 S Ct at 1853 (O'Connor, J., concurring).

The Sixth Circuit therefore erred in reversing the District Court and in holding that *it* "must decide whether the Michigan legislature . . . had a firm basis for believing that such action was required based on prior discrimination by the state itself." (App. 16a).[41]

C. The State Was Not Required To Make Separate Findings Of Discrimination Against Distinct Racial And Ethnic Groups Under *Wygant*.

The Sixth Circuit also held that separate findings of prior, purposeful discrimination against distinct racial and ethnic groups are required, citing *Wygant*, 106 S Ct at 1852 n 13, *JA Croson Co* and *Associated General Contractors of California*. (App. 27a, n. 14).

Only three Justices in *Wygant* joined in the view that separate findings for each racial or ethnic group are required. Justice O'Connor did not join in that part (IV) of the Court's plurality opinion. See *Wygant*, 106 S Ct at 1844.

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[41]

"(T)he empirical component of (strict) scrutiny, like any other form of factfinding, is the basic responsibility of district courts, rather than appellate courts." *Maine v Taylor*, ____ US ____, 106 S Ct 2440, 2451 (1986). "(A)ppellate Courts are not to decide factual questions *de novo*, reversing any findings they would have made differently." *Id.* Moreover, "(w)here there are two permissible views of the evidence, the factfinder's choice between them *cannot be clearly erroneous*." *Anderson v City of Bessemer City, NC*, 470 US 564, 574 (1985). (Emphasis added).

On the other hand, at least four Justices have previously expressed the view that for race conscious relief "it is enough that each recipient is within *a general class of persons* likely to have been the victims of discrimination." *Regents of the University of California v Bakke*, 438 US 265, 363 (1978) (Brennan, J., joined by White, Marshall and Blackmun, J.J., concurring in the judgment, dissenting in part). The Sixth Circuit had also adopted that position in *Ohio Contractors Ass'n*, 713 F2d at 174.

In *Local 28 of Sheet Metal Workers v EEOC*, 106 S Ct 3019, 3054 (1986), six members of this Court agreed that, in appropriate circumstances, preferential relief may benefit individuals who are not actual victims of discrimination. Moreover, the court noted that the purpose of affirmative action is to "dismantle *prior patterns*" of discrimination and to prevent future discrimination. 106 C St at 3049.

In this case, the Michigan legislature was empowered to act on the assumption that the "prior pattern" in state contracting was to give preference to white male contractors to the virtual exclusion of non-white males—i.e. minorities and women. See *Fullilove*, 448 US at 484-5 (Burger, C.J.) In light of the evidence, minorities and women constituted the general classes of persons most likely to have been discriminated against in state contracting.

Public Act 428 was designed to overcome long-established and continuing patterns of procurement which favored white male contractors with whom the State had always done business. *See* Small Business Task Force findings, *supra*, at 6. Those patterns appeared to be rooted in and were a continuation of prior discrimination.

II. THIS CASE PRESENTS SIMILAR ISSUES AND ISSUES IN ADDITION TO THOSE PRESENTLY PENDING BEFORE THE COURT ON APPEAL IN *CITY OF RICHMOND V JA CROSON COMPANY*, NO. 87-998.

On February 22, 1988, this Court noted probable jurisdiction in the case of *City of Richmond v JA Croson Company*, No. 87-998, on appeal from the Fourth Circuit. See 56 USLW 3568.

Similar to the action taken by the Sixth Circuit in this case, the Fourth Circuit originally affirmed a district court ruling upholding the City of Richmond's Minority Business Utilization Plan on the basis of *Fullilove*. See *JA Croson Co v City of Richmond*, 779 F2d 181 (CA 4, 1985). This Court granted certiorari, vacated the decision and remanded for reconsideration in light of *Wygant*. 106 S Ct 3327 (1986). On remand, the Fourth Circuit concluded that the plan is unconstitutional under *Wygant*.

Both *Croson* and this case involve the substantial question of whether *Wygant* imposes more stringent constitutional standards on states and cities in remedying the effects of past discrimination, than on the federal government under *Fullilove*. *See also* Brief of National League of Cities, US Conference of Mayors, National Association of Counties, and International City Management Association As *Amici Curiae* in Support of Appellant, in the *Croson* appeal.

While there are significant factual differences, the two cases also involve distinct constitutional issues which warrant plenary review by the Court.

First, the Fourth and Sixth Circuits applied different

standards in considering the evidence of prior discrimination underlying the two enactments.

The Sixth Circuit held on the basis of *Wygant* that the State was required to prove it had invidiously discriminated against minorities and women in State contracting, and found that the State's evidence was not "probative" of discrimination. The Fourth Circuit, on the other hand, stated that the Richmond City Council should not be held to as high a standard in its factfinding as a federal district court, noting that "legislative findings are different from judicial ones" and that the City Council "need not have produced formal, contemporaneous findings, so long as it had a firm basis for believing that remedial action is required." *JA Croson, supra*, 822 F2d at 1359.

The two standards clearly conflict.

Second, the remedial objectives of the two laws differ. Public Act 428 was designed to remedy past discrimination by state contracting officials and prime contractors in state contracting. The Richmond ordinance, on the other hand, was in response to prior discrimination by the local construction industry, which restricted development of local minority owned business. Apparently recognizing that city contracting could actually perpetuate the effects of that prior discrimination, the Richmond City Council adopted a remedial goal which would stimulate growth and development of minority business in the local industry.

Third, the Michigan statute also includes a separate provision for women, which involves a different analysis under the Fourteenth Amendment. See *Mississippi University for Women v Hogan*, 458 US 718, 724 (1982). That issue is not addressed in *Croson*; however, it was addressed by the Ninth Circuit in *Associated General Con-*

tractors of California v City and County of San Francisco, 813 F2d 922, 939-942 (CA 9, 1987).

In that case, the Ninth Circuit voided the minority business enterprise provision under the Fourteenth Amendment, but upheld the women business provision under the intermediate standard of review. In this case, the Sixth Circuit voided both provisions.

The Sixth Circuit notes that the Supreme Court has never defined the "substantially related to serve an important governmental interest" standard. (App. 28a). In voiding both provisions of Public Act 428, the Court of Appeals' analyses makes no more than a semantic distinction between a "compelling interest" for racial classifications and an "important interest" for gender classifications. *Id.* This Court's review of the appropriate standard for gender based remedial programs is therefore warranted.

Fourth, *Croson* involves a local ordinance, while this case involves a state statute. The Ninth Circuit has held that there are differences in the scope of authority of state and local governments to adopt remedial, affirmative action programs. *Assoc Gen'l Contractors of California, supra*, 813 F2d at 930. Although questionable, assuming *arguendo* that the Ninth Circuit's view is correct, a decision in *Croson* may not be fully applicable to the State of Michigan or dispositive of the issues in this case, given the different levels of government involved.

Fifth, Richmond's ordinance focuses on discrimination by prime contractors against minority subcontractors. Michigan's statute, on the other hand, seeks to remedy discrimination both by State contracting officials as welll as by prime contractors on state contracts.

In *Croson*, the Fourth Circuit holds that the City must establish a basis for believing that it *itself* had discriminated. 822 F2d at 1360. In the case of subcontracts, however, that focus is misplaced, since the issue is discrimination by prime contractors and contracting associations against minority contractors as subcontractors, and not discrimination by the governmental actor.

Although the State may not be the actual discriminating party itself in refusing to award subcontracts to minority and women owned businesses, it clearly has an affirmative duty to prohibit and remedy such discrimination by prime contractors on government contracts.[42]

The additional constitutional issues raised in this case warrant plenary review by the Court. Should the Court note probable jurisdiction in this case, argument could be combined with that in *Croson* pursuant to Supreme Court Rule 37.3.

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[42]

Government policy barring *employment* discrimination by government contractors has been in place since the mid-1950's. *See* Exec Order No 10479, 3 CFR 961 (1949-53); Exec Order No 10557, 3 CFR 203 (1954-58); and Exec Order 11246, 3 CFR 339 (1964-65). *See also* Michigan's Public Act 251 of 1955 and Sec 209 of the Elliott-Larsen Civil Rights Act of 1976, MCL 37.2209; MSA 3.548(209).

Both federal and state governments have also instituted administrative enforcement programs to insure "contract compliance" with equal employment opportunity. *See* 41 CFR Part 60 (Office of Federal Contract Compliance). The Michigan State Administrative Board, by resolution dated April 16, 1968, requires bidders on state contracts to demonstrate compliance with equal employment opportunity requirements prior to being awarded a contract.

CONCLUSION

For the aforementioned reasons, the Court should note probable jurisdiction of this appeal and schedule the case for plenary consideration.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record

Brent E. Simmons
Assistant Attorney General
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-6434

Attorneys for Appellants

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[583] MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al.,
Plaintiffs-Appellants,
v.
William G. Milliken, et al.,
Defendants-Appellees.
No. 86-1239.
United States Court of Appeals,
Sixth Circuit.
Argued May 4, 1987.
Decided Nov. 25, 1987.

* * *

[584]

* * *

Before LIVELY, Chief Judge, and ENGEL and KRUPANSKY, Circuit Judges.

KRUPANSKY, Circuit Judge.

Plaintiffs-appellants Michigan Road Builders Association, et al. (Michigan Road Builders or plaintiffs) appealed from the district court's order granting summary judgment in favor of the defendants-appellees, (defendants) in this civil rights action commenced for the purpose of challenging the constitutional validity of 1980 Mich.Pub.Acts 428 (Public Act 428), Mich.Comp.Laws § 450.771, *et seq.*[1] In

[1]

Plaintiffs-appellants "are (1) several non-profit associations whose members are, in general, construction firms, contractors and suppliers, who have done, or are doing business with the State of Michigan, and (2) various profit corporations who have had, or seek contracts with the State of Michigan." *Michigan Road Builders Ass'n v. Milliken*, 571 F.Supp. 173, 174 (E.D. Mich.1983). Defendants-appellees are William G. Milliken, the former Governor of Michigan, the Michigan Department of Management and Budget, Gerald H. Miller, the former Director of the Michigan Department of Management and Budget, the Michigan Department of Transportation, and John P. Woodford, the former Director of the Michigan Department of Transportation.

particular, the Michigan Road Builders charge that Public Act 428 which "set aside" a portion of state contracts for minority owned businesses (MBEs) and woman owned businesses (WBEs) impinges upon the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Section 2 of Public Act 428, Mich.Comp.Laws § 450.772 provides that after the 1984-85 fiscal year, each state department must award not less than 7% of its expenditures for construction, goods, and services to MBEs and not less than 5% to WBEs.[2] Under Public Act [585] 428, a "minority" is a "person who is black, hispanic, oriental, eskimo, or an American Indian." Mich.Comp.Laws

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[2]

Mich.Comp.Laws § 450.772 provides: Sec. 2. (1) The construction, goods, and services procurement policy for each department shall provide for the following percentage of expenditures to be awarded to minority owned and women owned businesses by each department except as provided in subsection (6):

(a) for minority owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 116% of the actual expenditures for 1982-83, and this level of effort at not less than 7% of expenditures shall be maintained thereafter.

(b) For woman owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 200% of the actual expenditures for 1982-83, the goal for 1984-85 shall be 140% of the expenditures for 1983-84, and this level of effort at not less than 5% of expenditures shall be maintained thereafter.

(2) If the first year goals are not achieved, the governor shall recommend to the legislature changes in programs to assist minority and woman owned businesses.

(3) Each department, to assist in meeting the construction, goods, and services procurement expenditures percentages set forth in subsection (1), shall include provisions for the accomodation of subcontracts and joint ventures. The provisions shall be established by the governor and shall require a bidder to indicate the extent of minority owned or women owned business participation.

(4) Only the portion of a prime contract that reflects minority owned or women owned business participation shall be considered in meeting the requirements of subsection (1).

§ 450.771(e), and a "minority owned business" is "a business enterprise of which more than 50% of the voting shares or interest in the business is owned, controlled, and operated by individuals who are members of a minority and with respect to which more than 50% of the net profit or loss attributable to the business accrues to shareholders who are members of a minority." Mich.Comp.Laws § 450.771(f). A "woman owned business" is "a business of which more than 50% of the voting shares or interest in the business is owned, controlled, and operated by women and with respect to which more than 50% of the net profit or loss attributable to the business accrues to the women shareholders." Mich.Comp.Laws § 450.771(j).

The Michigan Road Builders commenced the present action on July 8, 1981 in the United States District Court for the Eastern District of Michigan seeking declaratory and injunctive relief against the enforcement of the set-aside provisions of Public Act 428. In particular, the plaintiffs charged that the set-aside provisions of Public Act 428 violated the Equal Protection Clause of the Fourteenth Amendment, as well as 42 U.S.C. §§ 1981, 1983

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(5) Minority owned or woman owned businesses shall comply with the same requirements expected of other bidders including, but not limited to, being adequately bonded.

(6) If the bidders for any contract do not include a qualified minority owned and operated or woman owned and operated business, the contract shall be awarded to the lowest bidder otherwise qualified to perform the contract.

and 2000d,[3] by according racial and ethnic minorities and women a preference in competing for state expenditures. After dis- [586] covery had been completed, the parties filed cross motions for summary judgment, and on August 12, 1983, the district court determined that Public Act 428

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[3]

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Because the protections afforded by these sections are coextensive with the protections afforded by the Equal Protection Clause of the Fourteenth Amendment, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 287, 333, 98 S.Ct. 2733, 2746, 2770, 57 L.Ed.2d 750 (1978), (§ 1983 and 2000d); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 691-92 (6th Cir.1979) (§ 1981), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), this court need only analyze Public Act 428 under Fourteenth Amendment equal protection standards. *See Associated Gen. Contractors of Cal. v. City & County of San Francisco*, 813 F.2d 922, 928 n. 11 (9th Cir.1987). Plaintiffs also alleged in their complaint that Public Act 428 violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. See Johnson v. Transportation Agency*, _____ U.S. _____, 107 S.Ct. 1442, 1446 n. 2, 94 L.Ed.2d 615 (1987) (suggesting that Title VII analysis differs from constitutional equal protection analysis). They have abandoned this argument on appeal.

did not violate the Equal Protection Clause of the Fourteenth Amendment and granted defendants' motion for summary judgment. *Michigan Road Builders Ass'n v. Milliken*, 571 F.Supp. 173 (E.D.Mich.1983). Michigan Road Builders appealed, and this court dismissed the appeal because the district court had not decided all of the claims against the Michigan Department of Transportation. *Michigan Road Builders Ass'n v. Milliken*, 742 F.2d 1456 (6th Cir.1984). Thereafter, the district court entered an order disposing of the remaining charges against the Department of Transportation, *Michigan Road Builders Ass'n v. Milliken*, 654 F.Supp. 3 (E.D.Mich.1986), and the Michigan Road Builders commenced this timely appeal. On appeal, the plaintiffs argued that the district court applied the incorrect legal standard to determine the constitutional validity of Public Act 428.

In addressing equal protection claims, the Supreme Court has employed differing levels of judicial review depending upon the type of imposed classification under constitutional attack.[4] "Racial and ethnic distinctions of

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[4]

In considering equal protection claims, courts must first determine whether the governmental body imposing the classification at issue had authority to act to accomplish its purpose. *Fullilove v. Klutznik*, 448 U.S. 448, 473, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980) (plurality opinion); *Associated Gen. Contractors of Cal.*, 813 F.2d at 928. In the case at bar, the state asserted, and the plaintiffs did not dispute, that Public Act 428 was designed to ameliorate the effects of past discrimination against minorities and women competing for contracts to supply the state with goods and services. It is beyond contention that a state legislature has the prerogative and even the "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 1856, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring) (emphasis in original); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 172-73 (6th Cir.1983); *Associated Gen. Contractors of Cal.* 813 F.2d at 929. Accordingly, it is not disputed that the Michigan legislature had jurisdiction to act for the purpose of ameliorating the effects of past discrimination.

any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978) (plurality opinion) (concluding that state medical school's admission program which reserved a specified number of student positions for racial and ethnic minority applicants violated the Equal Protection Clause). This "most exacting judicial examination" has been labeled by the Supreme Court as "strict scrutiny." *Id.* at 287, 98 S.Ct. at 2747 (plurality opinion).

> When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.
>
> * * *
>
> We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."
>
> * * *
>
> Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Id. at 305-07, 98 S.Ct. at 2756-57 (plurality opinion) (citations omitted).

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Supreme Court probed a congressionally enacted affirmative action plan embodied in the Public Works Employment Act of 1977, 42 U.S.C.

§ 6701 *et seq.* The constitutional attack in that case was lodged against the "Minority Business Enterprise" set aside provision of the act, § 103(f)(2), 42 U.S.C. § 6705(f)(2), which required local governmental units receiving funds under public works programs to use 10% of the funds to procure services or supplies from MBEs. The court determined that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public con- [587] tracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *id.* at 477-78, 100 S.Ct. at 2774, and that the set aside provision therein at issue was "narrowly tailored to the achievement of [the] goal" of ameliorating the effects of that past discrimination. *Id.* at 480, 100 S.Ct. at 2776. Justice Powell, author of the *Bakke* opinion, concurred in the Court's opinion and filed an opinion in which he stated:

> Section 103(f)(2) [of the Public Works Employment Act of 1977] employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest.
>
> * * *
>
> The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable. Different standards of review applied to different sorts of classifications simply illustrate the principle that some classifications are less likely to be legitimate than others. Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.

448 U.S. at 496, 100 S.Ct. at 2783-84 (Powell, J. concurring).

Subsequent to the *Bakke* and *Fullilove* decisions, this circuit considered constitutional attacks on state and local government mandated affirmative action plans. In assessing the constitutional validity of the affirmative action plans at issue in the post-*Bakke* and *Fullilove* cases, this circuit redefined the term "strict scrutiny" as it applied in affirmative action cases:

> [T]he first stage in our approach to affirmative action programs entails an analysis of the need for such remedial measures—i.e., with the presence of a governmental interest in their implementation. It is uncontested that the government has a significant interest in ameliorating the disabling effects of identified discrimination.
>
> * * *
>
> Once the governmental interest in some remedial action is thus established, we must proceed to determine whether the remedial measures employed are reasonable.

Bratton v. City of Detroit, 704 F.2d 878, 886-87 (6th Cir.1983) (footnote omitted), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). *See also Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir.1979) (determining that no "direct showing of past intentional discrimination" by the governmental unit imposing the affirmative action plan was necessary and that the plan need only be a "reasonable" means of serving the governmental interest of eradicating the effects of past discrimination), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167

(6th Cir.1983) (where compelling interest of state in ameliorating the past effects of its prior discrimination was clear, the affirmative action plan adopted need only be "reasonably calculated" to serve that interest). In these decisions, this court essentially relaxed the strict scrutiny standard enunciated by the Supreme Court in *Bakke* and *Fullilove*. Thus, this circuit essentially required that affirmative action plans be a "reasonable" means of furthering a "significant" governmental interest rather than a "narrowly tailored" or "necessary" means of furthering a "compelling" governmental interest.[5]

In *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir.1984), this circuit again [588] applied its relaxed standard of review to uphold an affirmative action layoff plan embodied in a collective bargaining agreement between a public board of education and a teachers' union. In reversing the decision, the Supreme Court rejected the relaxed level of judicial scrutiny imposed by this circuit in *Wygant*:

> This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " . . . . "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."

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[5]

While the distinction between the terms "significant" and "compelling" may be negligible, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 1853, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring) (discussing distinction between terms "compelling" and "important"), as discussed below, it is clear that the district court in the case at bar considered the terms as having different meanings when it expressly refused to require defendants to demonstrate a "compelling" interest, but instead required them to demonstrate a "significant interest." 571 F.Supp. at 176-77.

> The Court has recognized that the level of scrutiny does not change merely because that challenged classification operates against a group that historically has not been subject to governmental discrimination. In this case, [the collective bargaining agreement] operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S.Ct. 1842, 1846-47, 90 L.Ed.2d 260 (1986) (plurality opinion) (citations omitted). Subsequent to rejecting the "compelling" nature of the governmental interests advanced by the board of education in support of the constitutional validity of the layoff plan, which interests had been found to be "sufficiently important" by this circuit, 106 S.Ct at 1847-49, the Court continued:

> The Court of Appeals examined the means chosen to accomplish the Board's race-conscious purposes under a test of "reasonableness." That standard has no support in the decisions of this Court. As demonstrated . . . above, our decisions always have employed a more stringent standard—however articulated—to test the validity of the means chosen

> by a state to accomplish its race-conscious purposes.[6] Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."
>
> [6]
>
> The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, . . . the term may be used to require consideration whether lawful alternative and less restrictive means could have been used. Or . . . the classification at issue must "fit" with greater precision than any alternative means. "[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense."

106 S.Ct. at 1849-50 (citations and footnote omitted). The Supreme Court left no doubt that the standard of judicial review previously employed by this circuit in racial and ethnic affirmative action cases was inappropriate.

In the case at bar, the district court, having issued its opinion nearly three years before the Supreme Court reversed this circuit in *Wygant*, erroneously decided the constitutional validity of Public Act 428 under this circuit's relaxed level of scrutiny:

> "A different analysis must be made when the claimants are not members of a class historically subjected to discrimination."
>
> * * *
>
> Having determined that the law of this Circuit requires that the State must demonstrate a *significant interest in ameliorating the past effects of present discrimination rather than the "compel-* [589] *ing interest" standard . . .*, this Court must examine the record

> to assess the nature of the interest of the State in enacting [Public Act] 428.
>
> * * *
>
> Having determined that the State has established its interest in ameliorating the present effects of past discrimination, this Court must now determine whether [Public Act] 428 is a *reasonable means of achieving that end.*

571 F.Supp. at 176-77, 187 (quoting *Bratton*, 704 F.2d at 887). The district court's analysis represented an erroneous application of strict scrutiny as that term has been defined and employed by the Supreme Court. In *Wygant*, the Supreme Court expressly disapproved of the reasoning employed by the district court in this case. Although the district court had properly analyzed the constitutional validity of Public Act 428 under the law of this circuit as enunciated in *Bratton*, *Detroit Police Officers' Ass'n*, and *Ohio Contractors Ass'n* when it issued its opinion in this case on August 12, 1983, "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 526, 21 L.Ed.2d 474 (1969) (footnote omitted). *See also Gulf Offshore Co. v. Mobile Oil Corp*, 453 U.S. 473, 486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981). Accordingly, in light of the Supreme Court's mandate in *Wygant*, this court must abrogate the legal conclusions of the district court in the case at bar.

As indicated by the Supreme Court precedent already discussed, a more appropriate constitutional review of racial or ethnic classifications adopted by governmental bodies should be subjected to a two stage evaluation. First, a court must determine whether a "compelling" state interest supports the use of the racial or ethnic classi-

fication. If the court concludes that a compelling interest exists, it must then determine whether the challenged state action employing a racial or ethnic classification is "narrowly tailored" or "necessary" to further that interest.

A state "unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 1065, 94 L.Ed.2d 203 (1987) (citations omitted) (plurality opinion). Before a state may permissibly employ a racial or ethnic classification, however, it must make a finding based upon material factual evidence, that it has in the past discriminated against those classes it now favors. If the state had not engaged in discrimination against racial and ethnic minorities in awarding contracts to supply the state with goods and services in the past, then it cannot assert *in praesenti* that it has a compelling interest in preferring MBEs in the award of such contracts.

> [The Supreme Court] never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination. * * * [P]rior discrimination [is] the justification for, and the limitation on, a State's adoption of race-based remedies.
>
> * * *
>
> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. * * * No one doubts that there has been serious racial discrimination in this country. But as the legal basis for imposing discriminatory *legal* remedies that

> work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.
>
> * * *
>
> [A State] must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed distinctions based on race." * * * In particular, [a state] must ensure that, before it embarks on an affirmative action program, [590] it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Wygant, 106 S.Ct. at 1847-48 (citations omitted) (some emphasis added). *See also Bakke*, 438 U.S. at 307, 98 S.Ct. at 2757 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals *in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. After such findings have been made*, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated.") (citations omitted) (emphasis added); *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213, 216 (6th Cir.1986) ("[T]he city should be required to present evidence of invidious discrimination."); *South Fla. Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d 846, 851-52 (11th Cir.) ("[A]dequate findings [must] have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic

group's interests over another. . . .") (emphasis in original), *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984); *Associated Gen. Contractors of Cal.*, 813 F.2d at 930 ("[S]tate and local governments [can] act only to correct their own past wrongdoing. . . ."). More recently, the Fourth Circuit has stated:

> [B]efore an asserted governmental interest in a racial preference can be accepted as "compelling," there must be findings of prior discrimination. Findings of *societal* discrimination will not suffice; the findings must concern "prior discrimination *by the government unit involved.*"
>
> * * *
>
> For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based on prior discrimination by the locality itself.
>
> * * *
>
> *Wygant* . . . limit[s] racial preferences to what is necessary to redress a practice of past wrongdoing.

J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358, 1360, 1362 (4th Cir.1987) (citations omitted) (emphasis in original). Accordingly, in the instant case, this court must determine whether the State of Michigan possessed a compelling interest in purging the present effects of alleged past discrimination by virtue of *its* past inequitable treatment of MBEs. To accomplish this result, this court must decide whether the Michigan legislature, based upon the evidentiary factual record before it, "had a firm basis for believing that such action was required based on prior

discrimination" by the state itself. *J.A. Croson Co.*, 822 F.2d at 1360.[6]

An examination of the evidence assertedly relied upon by the defendants in this action as support for their contention that the Michigan legislature had a firm basis for concluding that the state had engaged in discrimination in awarding contracts for goods and services clearly indicates that Michigan had not developed material evidence to support a conclusion that it had a compelling interest in adopting the racial and ethnic distinctions at issue in the case at bar. The defendants have relied upon certain conclusory historical resumes of unrelated legislative enactments and proposed enactments, executive reports, and a state funded private study conducted in 1974. This documentation is not reflective of discriminatory action by the State of Michigan.[7]

[591] The defendants have directed this court's attention to "executive memoranda"[8] concerning proposed leg-

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[6]

Because the factual record in this case is complete and this court's only function is to determine whether the evidence presented to the district court satisfied a legal standard, remand is unnecessary. *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1960, 80 L.Ed.2d 502 (1984).

[7]

The defendants in this action have, as a defense, "admitted" that the State of Michigan had engaged in impermissible discrimination in the award of state contracts. *See generally Appellee's Brief*, pp. 29-32. This "admission" is of little relevance and does not relieve this court of its duty to determine whether remedial legislation in the form of racial and ethnic classifications is, in fact, supported by a compelling interest in alleviating the present effects of past state discrimination. *Wygant*, 106 S.Ct. at 1849 n. 5 ("Nor can the [state] unilaterally insulate itself from this key constitutional question by conceding that it has discriminated in the past, now that it is in its interest to make such a concession.")

[8]

The "executive memoranda" which analyzed pending legislation were prepared for the Governor by each of the state's various executive departments.

islation considered by the Michigan legislature during 1971 and subsequent years. The first of these memoranda concern House Bill (H.B.) 4394 (1971) which would have relaxed bonding requirements for state construction contracts. The memoranda conjectured a belief that the state's stringent bonding requirements prohibited most small businesses from effectively competing for such contracts. The proposed statute would have assertedly served the dual purpose of fostering the growth of small businesses in general and benefiting the state by increasing competition for state construction contracts. Fostering the growth of MBEs in particular was not a concern or purpose expressed in the legislative history of H.B. 4394.

Senate Bill (S.B.) 885 (1975) would have set aside a percentage of state goods and services procurement contracts for small businesses. The asserted purpose of this proposed legislation was to foster the growth of small businesses in light of Michigan's "sluggish economy." Again, fostering the growth of MBEs was not a consideration for this proposed legislation.

S.B. 1461 (1976) and S.B. 10 (1977)[9] would have also set aside an allotment of state contracts for small businesses. The executive memoranda commenting upon these enactments suggested that increasing the number of contracts awarded to small businesses would also increase the number of MBEs, which were predominantly small businesses, doing business with the state. In addition, S.B. 1461 included a provision which would have set aside contracts for "socially or economically disadvantaged persons." In testimony given before the Michigan Senate State Affairs Committee in support of S.B. 1461, Norton L. Berman,

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[9] S.B. 1461 and S.B. 10 were essentially identical and were introduced in successive sessions of the Michigan legislature. Neither proposal was enacted into law.

Director of the Office of Economic Expansion within the Department of Commerce, indicated that underrepresentation of MBEs in state contracting resulted from factors other than discrimination by the State of Michigan:

> Small and minority businesses traditionally have experienced problems in management, financing, and market development. These problems oftentimes result from the inability of small businessmen to generate sufficient capital to meet their operational needs.
>
> * * *
>
> Through a series of public hearings and questionnaires sent to small and minority businesses, business persons expressed their concerns in several areas, some of which were: complexity of procurement procedures, information distributed of state agencies was inadequate, contracts were too large, there was no requirement on the part of large contractors to solicit bids from small and minority subcontractors, excessive delay in paying vendors, excessive pre-award costs and bonding requirements which small and minority businessmen could not meet.
>
> * * *
>
> [P]ast business patterns have resulted in under representation of minorities in the business community. Therefore, I feel the state is remiss if we do not do what we can to assure that minority business obtain an equitable share of state purchasing.

I am aware there are those who view this legislation as preferential treatment and the distortion of the competitive spirit of purchasing. I agree that this might be considered so, but unorthodox methods are needed to create opportunities [592] for a major segment of our society that can contribute more to eco-

> nomic stability. With regards to competition, what we have now in many industries is competition among the small operators and domination by a few large firms. Large businesses often can sell at a considerable lower price because of high volume of sales, more efficient distribution systems and more advertising and promotion. Small business cannot equitably compete because of these disadvantages of size.

As reflected in Berman's testimony, the relative lack of MBEs doing business with the state was coupled with the objective reality that most MBEs were small businesses. Small businesses, *as a result of their size*, were unable to effectively compete for state contracts. Consequently, most MBEs, *as a result of their size*, were unable to effectively compete for state contracts.

The legislative history of Public Act 428 itself offered no support for the contention that the State of Michigan intentionally discriminated against MBEs. A House Legislative Analysis of the bill attributed the scarcity of MBE contracts with the state to the lack of minorities within the business community *as a result of societal discrimination*:

> Statistical descriptions of the extent of participation in state programs by businesses controlled by women and minorities are varied and sometimes contradictory depending on the definitions used and the samples of state spending examined. These descriptions, however, all reveal that such businesses receive a disproportionately small share of state spending for construction and goods and services in relation to their proportion of the state's population. That minorities and women have been systematically denied equal opportunity in this country is sad historical fact now generally accepted and widely recognized in legisla-

> tion of the past two decades. In the interests of justice as well as the social and economic health of the state, the legislature should do all that it can to ensure that businesses owned by minorities and women obtain their fair share of the state's business.
>
> * * *
>
> The federal government and other state governments are already proceeding in this direction as a remedy to the under representation of minority and other segments of business in the business community. The legal issues are difficult and outcomes of various litigations impossible to predict. In the meantime Michigan should continue to be a participant in the enactment of progressive legislation, which would in any case enhance the growth of these underrepresented sectors of the business community, at least until the question of constitutionality is resolved.

Evidence of societal discrimination, however, is an insufficient basis for the employment of racial and ethnic distinctions by state of local governments. *Wygant*, 106 S.Ct. at 1848; *J. Edinger & Son, Inc.*, 802 F.2d at 216-17.

The evidence consisting of executive action designed to increase small business and MBE participation was also insufficient to support a conclusion that the state had discriminated against MBEs. In 1975, the Governor issued Executive Directive 1975-4 creating a task force to study small business participation in state purchasing. After conducting two public hearings wherein witnesses testified that small and minority businesses' size and lack of expertise prohibited them from effectively competing for state purchasing contracts, the task force issued its report recommending the adoption of policies and procedures to aid small and minority businesses in the state procurement process.

In response to the task force's report, the Governor issued Executive Directive 1976-4 wherein he established the Small and Minority Business Procurement Council (Council) to oversee the declared "policy of tye [sic] executive branch agencies of the State of Michigan . . . to aid, counsel, assist and protect the interests of small and minority business concerns in order to preserve free competitive enterprise and to [593] insure that a fair portion of the procurement of state agencies and agencies of the state be placed with small and minority business enterprises." In 1977, the Council issued its first annual report in which it noted that the objectives establishing small and minority business participation in state purchasing had been achieved.

In 1975, the Governor also issued Executive Directive 1975-6 wherein he commanded the Michigan Department of Civil Rights (MDCR) to assist the other state departments in developing and implementing standards and procedures to assure nondiscrimination in awarding state contracts. In 1978, the MDCR issued a report in which it expressed concern over limited compliance with Executive Directive 1975-6 because of the lack of adequate staff in some agencies and the inexperience of personnel in dealing with civil rights matters. The MDCR did not suggest that limited compliance with Executive Directive 1975-6 was the result of intentional discrimination.

The evidence most heavily relied upon by the defendants in this action was the report of a 1974 state-commissioned study by Urban Markets Unlimited, Inc. (Urban Markets). The report, entitled "A Public Procurement Inventory on Minority Vendors," was prefaced with the rather dubious statement: "Minority-owned business enterprises are often described as being synonymous with

small business."[10] The report noted that there were 8,112 minority businesses in Michigan, but that in a small sampling of purchase contracts, only four did business with the state.[11] The contracts sampled, however, represented only approximately $21 million of state's annual expenditures of over $437 million. The sampling was necessarily small and of little value because, as the report noted, the state did not maintain data on minority procurement by state agencies.[12]

Because the statistical evidence was not probative of discrimination, Urban Markets also circulated questionnaires to and conducted interviews of state officials responsible for purchasing goods and services for various state agencies and departments. Responses to Urban Markets' inquiries disclosed that most state agencies did not actively seek new sources of supplies, but instead relied

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[10]

The report offers no evidence for this proposition. While it may well be true that most MBEs are small businesses, the notion that the terms are synonymous is not persuasive. There are, no doubt, a substantial number of non-minority small businesses, which, because of their size, also experience problems in effectively competing for state contracts. This questionable proposition, upon which much of the report's analysis is based, seriously undermines the validity of the conclusions reached by Urban Markets.

[11]

As an indication that most MBEs were small businesses, Urban Markets reported that only 2,577 of Michigan's 8,112 MBEs had paid employees and all 8,112 businesses employed a total of only 10,958 persons.

[12]

Only 4 of 26 state agencies maintained data on purchases from MBEs. Indeed, one of the report's recommendations was that the state "establish a means of collecting data on the quantity, types, and dollar amounts of purchases which the State expends with minority vendors." The fact that the state admittedly kept no data on MBE participation in state contracts seriously undermined the defendants' attempt to rely on the "statistical evidence" incorporated into the Urban Markets report as an indication of past state discrimination.

primarily upon "already established purchasing contracts" when filling new orders for goods and services. In particular, the study indicated that only three state agencies were using minority business directories to "actively seek-out" minority suppliers, and that some purchasing officials expressed unfavorable impressions of the quality and reliability of performance afforded by small and minority businesses. Significantly, Urban Markets did not conclude that state purchasing policies were discriminatory, but rather "[m]ost agencies indicated that awards [were] based upon the lowest satisfactory bid."

Most damaging to the defendants' contention that Michigan legislature was motivated by a compelling interest to eradicate the effects of past state discrimination when it enacted Public Act 428 were defendants' responses to plaintiffs' interrogatories in this action. Plaintiffs requested the defendants to identify the findings of [594] past discrimination against each of the minority groups favored in Public Act 428, and defendants responded to each interrogatory as follows:

> (1) Upon information and belief, the Michigan Legislature found that
>
> (a) there had been a history of significant political, economic, and cultural discrimination based upon race, ethnic origin, and sex in the United States, including Michigan; and
>
> (b) among the racial and ethnic minorities who have been the victims of such discrimination are Eskimos, Hispanics, Orientals, Indians (Native Americans), Blacks; and
>
> (c) Females have been the victims of discrimination based upon sex; and

(d) as a result of the discrimination described in 1(a) above, racial and ethnic minorities and females have been subjected to economic disadvantages; and

(e) among the consequences of the discrimination described in 1(a) and (d) above, has been an inability to compete on an equal competitive level for access to contracting opportunities with government, including but not limited to such opportunities with the State of Michigan; and

(f) as a result of competitive limitations imposed on racial and ethnic minorities and females because of the discrimination aforesaid, other persons not in those categories enjoy an artificial and unfair advantage in the competitive process; and

(g) the advantages resulting to persons not subject to discrimination based upon racial or ethnic considerations or those of gender reduce competition for state contracts and thereby result in greater costs to the taxpayers for goods and services needed by the State of Michigan; and

(h) establishment of goals and timetables effecting state procurement policies was the most effective feasible means available to remedy the present effects of the discriminatory history and conditions described in (1)a, (d), and (e) above; and

(i) increases in the number of businesses qualified to compete for state contracts will result in a cost benefit to the taxpayers.

In addition, the plaintiffs directed the defendants to identify documents supporting the legislature's conclusion that

the state had discriminated against minorities and women in the award of state contracts. In their answer, the defendants, other than referring to the evidence discussed above, again relied upon *societal* discrimination, referring generally to "the history of the western world for the past 2000 years." Furthermore, the state again acknowledged that it did not maintain records concerning the number of MBEs which bid on state contracts and the number which were awarded state contracts.

After reviewing the record in its entirety as developed before the district court, this court concludes that the Michigan legislature had little, if any, probative evidence before it that would warrant a finding that the State of Michigan had discriminated against MBEs in awarding state contracts for the purchase of goods and services. At best, the evidence suggested that societal discrimination had afforded the obstacle to the development of MBEs in their business relationship with the State of Michigan. Consequently, relatively few MBEs exist,[13] and those that do are generally small in size and have difficulty in competing for state contracts *as a result of their size.* The evidence does not prove that the State of Michigan invidiously discriminated against racial and ethnic minorities in awarding state contracts. Accordingly, this court concludes that the state has not supported its conclusion that it had a compelling interest in establishing the racial and ethnic classifications contained in Public Act 428, and

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[13]

Berman testified in support of S.B. 1461 that minorities comprise 13.73% of the general population of Michigan, but MBEs comprised only 5.85% of the businesses within the state.

those classifications are, therefore, constitutionally invalid.[14]

[595] With regard to the preference accorded WBEs by Public Act 428, the Supreme Court has employed a less stringent standard of review or level of scrutiny for gender based classifications:

> Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exeedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979). The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980).

Mississippi Univ. for Women v. Hogan 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982) (footnote

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[14]

There is no proof to support preference for the groups listed in Public Act 428, i.e., persons who are "black, hispanic, oriental, eskimo, or an American Indian." Mich.Comp.Law § 450.771(e). In the answers to plaintiffs' interrogatories, defendants admitted that they were "unaware" of how many MBEs in each of the above minority groups bid for and were awarded state contracts. A finding of "prior, purposeful discrimination against members of each of these [favored] minority groups" is required before state and local governments are permitted to remedy alleged discrimination by the enactment of laws embodying racial and ethnic distinctions. *Wygant*, 106 S.Ct. at 1852 n. 13. *See also J.A. Croson Co.*, 822 F.2d at 1361; *Associated Gen. Contractors of Cal.*, 813 F.2d at 934.

omitted). Although the Supreme Court has never expressly defined these terms, "substantially related to serve an important governmental interest" is regarded as a less stringent judicial standard of review than "narrowly tailored to serve a compelling governmental interest." *Associated Gen. Contractors of Cal.*, 813 F.2d at 939 (describing level of scrutiny for gender based classifications as "mid-level review").

Even under the less stringent standard of review, the WBE preferences in Public Act 428 cannot withstand constitutional attack since evidence of record that the state discriminated against women is non-existent. Defendants' reliance upon general assertions of societal discrimination are insufficient to satisfy their burden absent some indication that the "members of the gender benefited by the classification actually suffer[ed] a disadvantage related to the classification." *Mississippi Univ. for Women*, 458 U.S. at 728, 102 S.Ct at 3338. Defendants presented no evidence that WBEs suffered a disadvantage in competing for state contracts. Accordingly, Public Act 428's gender-based classifications are also invalid.[15]

For the foregoing reasons, this court concludes that Public Act 428, Mich.Comp.Laws § 450.771 *et seq.*, is unconstitutional. Consequently, the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the plaintiffs in accordance with this opinion.

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[15]

Because this court concludes that Michigan lacked a "compelling" interest to support the racial and ethnic distinctions, and an "important" interest to support the gender based distinctions, embodied in Public Act 428, this court does not address the second prong of the constitutional examination, i.e., whether the means were "narrowly tailored" and "substantially related" to the achievement of its goal of eradicating the present effects of prior discrimination.

LIVELY, Chief Judge, dissenting.

Because I disagree with both major premises of the majority opinion, I must respectfully dissent.

I.

The majority reads *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), as if it changed all the previously accepted standards for judging the validity of affirmative action programs of governments and governmental units. That is not a fair appraisal of the purport or effect of *Wygant*.

In *Wygant* itself the Court noted that it is necessary in some cases to take race into account, and emphasized the difference in [596] consequences flowing from a program such as the one involved in this case and one that requires layoffs, as the plan in *Wygant* did. This emphasis was made by contrasting the minority set-aside program that the Court had approved in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), with the plan under consideration in *Wygant*, which did require layoffs:

> We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id. [Fullilove*, 448 U.S.] at 484, 100 S.Ct. at 2778, quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). In *Fullilove*,

> the challenged statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the "actual burden shouldered by nonminority firms is relatively light." 448 U.S. at 484, 100 S.Ct. at 2778.
>
> Significantly, none of the cases discussed above involved layoffs. Here, by contrast, the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential layoffs scheme imposes on innocent parties. See *Firefighters v. Stotts*, 467 U.S. 561, 574-576, 578-579, 104 S.Ct. 2576 [2585-2586, 2587-2588], 81 L.Ed.2d 483 (1984); see also [*Steelworkers v.] Weber*, n. 9, *supra* this page, 443 U.S. [193] at 208, 99 S.Ct. [2721] at 2730 [61 L.Ed.2d 480 (1979)] ("The plan does not require the discharge of white workers and their replacement with new black hirees"). In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

106 S.Ct. at 1850-51 (footnotes omitted).

The Michigan program is similar to the federal MBE program in *Fullilove*. At most, nonminority owned businesses will be required to share the state's contracts with

minority owned businesses; no white owned business will be removed from a previously awarded contract. I believe this case is controlled by *Fullilove* and *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir.1983), rather than by *Wygant*.

The Supreme Court has been unable to agree on the precise level of scrutiny required when considering race conscious programs to assist minorities. While there is a consensus that race conscious programs demand an elevated level of scrutiny, the Court has not defined that level. This is clear from an examination of the plurality opinions from *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), to *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). In fact a plurality of the Court in *Paradise*, a case subsequent to *Wygant*, noted it has "yet to reach consensus on the appropriate constitutional analysis." *Id.* 107 S.Ct. at 1064.

Despite this uncertainty, at least two prerequisites for a constitutionally acceptable race conscious program are clearly established. The program must be in response to a compelling state goal and it must be narrowly tailored to achieve that goal. The majority concedes, as it must, that the State of Michigan has a compelling interest in eliminating race and gender discrimination from its procedures for awarding public contracts. I believe the Michigan program also satisfies the second requirement in that it is narrowly tailored. Given the [597] subject matter involved—public contracting—it is hard to conceive of a different approach that would achieve the state's legitimate goals in a less intrusive way. In my opinion the plan chosen by Michigan to correct a system that virtually excluded minority contractors in the past "fits" the situation better than any alternative means. See *Wygant*, 106 S.Ct.

at 1850 n. 6, where the Court discusses the meaning of "narrowly tailored," and quotes Professor Ely's definition: "the classification at issue must 'fit' with greater precision than any alternative means."

II.

I also disagree with the majority's conclusion that the State of Michigan did not develop material evidence that established the existence of past discrimination or the need for a program to increase minority participation. An examination of the record totally refutes this conclusion. The district court found that the Michigan legislature considered the following evidence before finally adopting P.A. 428 in 1981:

> 1. An Executive Memorandum concerning House Bill No. 4394 (1971). The bill was to help small businesses receive government contracts; MBEs considered to fall within the classification of a small business. Bill and Memorandum indicate early concern for plight of minorities. 571 F.Supp. 178-79.
>
> 2. A study commissioned by the state in 1974 to explore the state's procurement policies and its effects upon minorities (the Urban Markets Unlimited Study). Report issued in 1974 examined the procurement opportunities that were available to minority businesses, concluding that opportunities were not great, and that purchasing agents expressed negative attitudes toward minority vendors. *Id.* at 179-81.
>
> 3. Three Senate Bills introduced in 1975-77 (Senate Bills 885 (1975), 1461 (1976), and 10 (1977)). These bills addressed set-asides for small businesses, but were also designed to address the problems facing minority businesses. *Id.* at 181.

4. Testimony of Norton L. Berman, Director of Office of Economic Expansion, Michigan Department of Commerce, concerning Senate Bill 1461 and encouraging legislature to enact set-asides. *Id.* at 181-82.

5. The Governor's Executive Directive 1975-4 (1975), creating a Task Force on Small Business Participation in State Purchasing. Directive emphasized minority businesses and the difficulty they have had getting into the mainstream of business. *Id.* at 182.

6. Two public hearings of the Task Force, where views were expressed concerning the difficulties of minority businesses. *Id.* at 183.

7. The Task Force's Final Report (March 1976), recommending, inter alia, that goals be established for the participation of MBEs in state procurement. *Id* at 183.

8. The Governor's Executive Directive 1976-4 (1976), stating that it is the executive branch's policy to ensure that MBEs get a fair portion of business with the state and creating the Small and Minority Business Procurement Council. *Id.* at 183.

9. The First Annual Report of the Council (1977), noting that the commitment for MBEs was reached in the first year. *Id.* at 183-184.

10. The Governor's Executive Directive 1975-6 (1975), directing the Michigan Department of Civil Rights to, inter alia, establish standards to assure nondiscrimination in state contracting. *Id.* at 184.

11. The May 15, 1978 Report of the Department of Civil Rights, expressing concern over limited progress that had been made under Directive 1975-6. *Id.* at 184.

12. Proposed House Bill 4335, initiated March 15, 1979, which provided for MBE set-asides, and later, WBE set-asides. *Id*, at 184-85.

House Bill 4335 was adopted by the legislature two years after it was introduced and became P.A. 428, the Act at issue in this case. The district court concluded that [598] this evidence was sufficient for "the Legislature to make a finding of past intentional discrimination." *Id.* at 187. This is a finding of fact that is fully supported by the record and is not clearly erroneous.

The majority's conclusion that the evidence in this case at best suggested "that societal discrimination had afforded the obstacle to the development of MBEs in their business relationship with the State of Michigan" has no support in the record. The Supreme Court has determined that societal discrimination in and of itself is not sufficient justification for enactment of an affirmative action plan. *Wygant*, 106 S.Ct. at 1847. As the Court noted in *Bakke*, it has never "approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 307, 98 S.Ct. at 2757. Societal discrimination is best exemplified in *Wygant*. The school board extended preferential protection against layoffs to minority employees in order to provide minority students with minority role models. In holding this was an insufficient justification, the Court noted there must be some showing of prior discrimination by the governmental unit and that the plan must have a remedial purpose.

The legislative record in this case clearly shows that the plan enacted by the State of Michigan was not designed

solely to aid persons perceived as members of "relatively victimized groups" or to create "role models" for minorities. As noted, the Michigan Legislature began in 1971 to review the problem of limited participation of minority and woman owned businesses in the state's procurement of goods and services. The plan that was adopted approximately nine years later was the culmination of numerous studies, hearings and proposals to rectify the situation. Any acceptable understanding of the concept of federalism requires us to accord the same degree of deference to the findings of a state legislature following years of study and investigation that we give to findings of Congress. The majority's rejection of the legislative showing of prior discrimination is improper, not only because it fails to give the deference that a federal court should give to a state legislature's findings, but because the level of findings which the majority would exact from the legislature has not heretofore been required.

The Supreme Court noted in *Fullilove* that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478, 100 S.Ct. at 2774. The Court determined that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-78, 100 S.Ct. at 2774. There is sufficient evidence in the legislative record of Michigan Public Act 428 to support a determination that the state's procurement practices did perpetuate the effects of prior discrimination, resulting in an extremely small percentage of contracts being awarded to minority and woman owned businesses.

As we stated in *Ohio Contractors Ass'n v. Keip*, 713 F.2d at 173:

> The state has chosen to remedy the effects of *its own* past discriminatory practices by means of a program which imposes relatively light burdens on the majority group which was in position to benefit from those practices.

(Emphasis in original). Michigan did the same thing for the same reasons.

Finally, in my opinion the majority places entirely too much emphasis on semantics. The district court's use of "significant" as opposed to "compelling" in describing the state's interest is immaterial, given that the state clearly did have a compelling interest in eliminating discriminatory practices from its contracting and procurement procedures. Although the district court referred to a "reasonableness" test in reviewing the means chosen by Michigan to deal with the state's interest, in actually testing the MBE program the district judge ex- [599] pressly analyzed all of the factors that the plurality of the Supreme Court analyzed in applying the "narrowly tailored" standard in *Fullilove*. 571 F.Supp. at 188.

I would affirm the judgment of the district court.

* * *

[3] MICHIGAN ROAD BUILDERS ASSOCIATION INC., a Michigan Corporation, et al. Plaintiffs,

v.

William G. MILLIKEN, as Governor of the State of Michigan, et al. Defendants.

No. 81-72258.

United States District Court, E.D. Michigan, S.D.

Feb. 10, 1986.

* * *

[4] MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

JULIAN ABELE COOK, Jr., District Judge.

This action was originally filed in July, 1981 by several non-profit associations and for-profit corporations, who have or are doing business or seeking contracts with the State of Michigan. In their original Complaint, Plaintiffs (hereinafter collectively referred to as "the Michigan Road Builders") alleged that their constitutional and civil rights had been violated by the enactment and enforcement of Michigan's Public Act 1980, No. 428 ("P.A. 428"). M.C.L. § 450.771 *et seq.*; M.S.A. § 3.540(51) *et seq.* Defendants, the former Governor of Michigan and various State officials, agencies and departments ("the State of Michigan"), denied those allegations claiming that P.A. 428 was constitutional and consistent with the laws of the United States.

On March 26, 1982, the Michigan Road Builders filed an Amended Complaint further alleging that the State of Michigan, and in particular the Michigan Department of Transportation (MDOT), "wholly apart from P.A. 1980, No. 428, and without legislative authorization, has determined that exclusively state discretionary funds may be voluntarily set aside by State departments for the procurement of goods, services and construction from minority-owned and woman-owned businesses." Amended Complaint, paras 7, 12 and 13.

Motions for Summary Judgment were filed by both sides in November, 1981. On August 12, 1983 this Court issued a Memorandum Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment. *Michigan Road Builders Association, Inc. v. Milliken*, 571 F.Supp. 173 (E.D.Mich.1983).[1] The Court found that "P.A. 428 is constitutionally permissible and is not violative of the Equal Protection Clause of the Fourteenth Amendment," and that furthermore the Act "does not violate 42 U.S.C. section 1981, 42 U.S.C. section 1983, 42 U.S.C. section 2000d, 42 U.S.C. section 2000e". 571 F.Supp. at 190. Judgment for the State of Michigan was entered on August 12, 1983.

Plaintiffs appealed that Judgment to the U.S. Court of Appeals for the Sixth Circuit. On September 17, 1984, the Sixth Circuit dismissed the appeal for lack of jurisdiction. *Michigan Road Builders Assoc., Inc., v. Milliken*, 742 F.2d 1456 (6th Cir 1984). In its Order of dismissal, the Sixth Circuit stated that the district court had not decided the claims against MDOT. It further stated that since not

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[1]

The Department of Transportation is mistakenly identified as the Department of Treasury in this Court's Opinion of August 12, 1983.

all claims had been decided by this Court, and since no Rule 54(b) certification had been granted, it was without jurisdiction to review the August 12, 1983 decision.

It appears that while the Judgment of August 12, 1983 disposed of Plaintiffs' constitutional and federal statutory claims, as set out in the original Complaint, that decision left unresolved certain claims set out in the Amended Complaint. Specifically, whether the State of Michigan and MDOT have implemented voluntary programs, without legislative approval and apart from P.A. 428, for the setting aside of exclusively State discretionary funds for the procurement of goods, services, and construction from minority-owned and woman-owned businesses. Further, Defendants [5] contended that the August 12, 1983 Opinion and Judgment left unresolved the issue of whether Plaintiffs lacked standing to bring this action.

On October 23, 1984, a status conference was held to discuss disposition of the remaining issues. Counsel for the Michigan Road Builders and the State of Michigan appeared. At that time, Plaintiffs' counsel indicated that her clients no longer wished to pursue those claims and that they were willing to stipulate to a dismissal. Counsel for the State indicated its willingness to enter into a stipulation of dismissal. The Court then directed Plaintiffs' counsel to prepare the necessary papers.

No stipulation was ever prepared. On August 2, 1985, nine months after the status conference, the State of Michigan filed a Motion for Summary Judgment on the remaining claims, along with two supporting Affidavits, exhibits from the present stipulated record and additional public documents from state agencies. Plaintiffs filed a response on January 24, 1986 and a hearing was held on January 27, 1986.

Upon a review of the record, Affidavits and statements of counsel in the present case, the Court determines that there are no genuine issues as to any material fact on the remaining issues and claims. The State of Michigan is entitled to judgment as a matter of law, in accordance with Fed.R.Civ.P. 56(c). The Court bases its ruling upon the following undisputed facts and conclusions of law.

As reflected in the careful wording of their Amended Complaint, Plaintiffs do not dispute that P.A. 428 authorizes the use of set asides "*by requiring* that certain percentages of state expenditures be awarded to minority and woman-owned businesses". Amended Complaint, para. 9. (Emphasis added). Indeed, both the plain language of the statute and its legislative history indicate that P.A. 428 authorizes the use of set asides. The statute expressly states that "each department *shall* provide for the following percentage of expenditures *to be awarded to minority owned and woman owned businesses* . . . ". M.C.L. § 450.772(1); M.S.A. § 3.540(52)(1) (emphasis added). The legislative analysis of both the Michigan House and the Senate refer to the measure as a "set aside program." Defendants' Exhibits 19A(17); 49.

Plaintiffs' assertion, on the other hand, is that the state has voluntarily set aside exclusively state discretionary funds "wholly apart from P.A.1980, No. 428, and without legislative authorization." Amended Complaint, paras. 7, 12 and 13. In their First Amended Complaint, Plaintiffs rely upon Defendants' Exhibit 46G in supporting its claim against MDOT. Plaintiffs have offered no other evidence against other state agencies, departments or officials in support of their claims that those agencies have also set aside state discretionary funds without legislative authorization. See Amended Complaint, paragraph 12.

Exhibit 46G is entitled "Michigan Department of Transportation, the Expanded Minority Business Enterprise (MBE) and Woman Business Enterprise (WBE) Program Procedures", and is dated February 18, 1981. The Expanded Program Procedures were apparently promulgated, in part, in response to federal regulations by the U.S. Department of Transportation, published on March 31, 1980. See 49 CFR Part 23.

The Court notes that the November 16, 1981 Affidavit of Ho-Lum Wong, acting liaison officer for MDOT, states that:

> "MDOT has never implemented any bid procedure requiring or permitting set aside for females or minorities as a result of 1980 PA 428, or any administrative policies issued pursuant thereto."

(Affidavit, paragraph 7)

However, Mr. Wong also states that Exhibit 46G is MDOT's governing policy (paragraph 5). As stated on page 1 of the document:

> "In addition to the procedures as outlined in this program, the Department (of Transportation) will adhere to all current Federal *and State* laws, regulations and orders concerning Minority Business Enterprises and Woman Business Enter- [6] prises as related to the Department's program." (emphasis added).

Thus, the Expanded Program Procedures were subject to state, as well as federal, laws and regulations, despite Mr. Wong's statement that MDOT had not implemented procedures pursuant to P.A. 428. It is not disputed, however, that MDOT did, in fact, have a set-aside program in operation.

Since P.A. 428 was effective January 13, 1981, a month prior to the effective date of the Expanded Program Procedures, it is clear that P.A. 428 provided legislative authority for the kind of set-aside program established by MDOT in Defendant's Exhibit 46G. Plaintiffs do not dispute that the Expanded Program Procedures and P.A. 428 provided authority for MDOT's set-aside program as of February 18, 1981, and the Court so finds.

Defendant Exhibit 46G has been superseded by MDOT's "Disadvantaged Business Enterprise (DBE), Minority Business Enterprise (MBE), and Woman Business Enterprise (WBE) Program Procedures", dated June 27, 1984. See Defendant's Exhibit 55. That policy statement expressly cites P.A. 428 as MDOT's program authority for attaining the minority- and woman-owned business procurement goals required for 100 percent State funded projects. Defendant's Exhibit 55, pp. 1 and 8. In addition, Mr. Larry L. Leatherwood, Liaison Officer for MDOT's Office of Small Business Liaison, states in his Affidavit accompanying the State's Motion for Summary Judgment that: "Since at least January 1984 MDOT has recognized that the standards and requirements of 1980 P.A. 428 do apply to its set aside program involving 100% State funded contracts". Def. Exhibit 56, p. 2.

Plaintiffs have offered no controverting affidavits or evidence, as required under FRCP 56(e), in response to Exhibits 55 and 56, which were offered in support of the State's Motion for Summary Judgment. Accordingly, the Court finds that MDOT's set aside program is both authorized by and is pursuant to P.A. 428. Furthermore, since Plaintiffs have offered no evidence to support their allegations with regard to other State agencies, the Court also concludes that in this case no violation of P.A. 428 has been shown in the operation of set aside programs by other State agencies, departments or officials.

Summary Judgment shall therefore be entered in favor of Defendants and against Plaintiffs on the remaining claims set out in the Amended Complaint.

Before concluding this matter, the Court notes that on July 12, 1983, a month prior to this Court's original August 12, 1983 decision, the Sixth Circuit upheld the constitutionality of the set aside provisions of the Ohio minority business enterprise statute in *Ohio Contractors Association v. Keip*, 713 F.2d 167 (6th Cir.1983). This Court has reviewed that decision, as well as the Eleventh Circuit's decision in *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir.1984), *cert. den.* 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150.

The Court further finds that its August 12, 1983 decision is consistent with the standards set forth in the Sixth Circuits' Opinion in *Ohio Contractors*, and therefore it reaffirms its decision upholding the constitutionality and validity of P.A. 428. The Court finds that the plaintiffs had standing to assert their claims regarding the constitutionality and validity of P.A. 428.

SO ORDERED.

FILED—FEB 23, 1988
JOHN P. HEHMAN, CLERK

No. 86-1239

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., A MICHIGAN CORPORATION, ET AL., **Plaintiffs-Appellants,** **v.** **WILLIAM G. MILLIKEN, AS GOVERNOR OF THE STATE OF MICHIGAN, ET AL.,** **Defendants-Appellees.**	**ORDER**

BEFORE: LIVELY, Chief Judge, ENGEL and KRUPANSKY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/
John P. Hehman, Clerk

[173] MICHIGAN ROAD BUILDERS ASSOCIATION, INC.,
a Michigan corporation,
et al, Plaintiffs,

v.

William G. MILLIKEN, as Governor of the State of Michigan, et al.,
Defendants.

Civ. A. No. 81-72258.

United States District Court,
E.D. Michigan, S.D.

Aug. 12, 1983.

* * *

[174] MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

JULIAN ABELE COOK, Jr., District Judge.

Plaintiffs are (1) several non-profit associations whose members are, in general, construction firms, contractors and suppliers, who have done, or are doing business with the State of Michigan, and (2) various profit corporations who have had, or seek, contracts with the State of Michigan. Defendant, William G. Milliken, is the former Governor of the State of Michigan. Defendant, The Department of Management and Budget of the State of Michigan, is a unit within State Government whose responsibilities include the procurement of supplies and services for the State. Defendant, Gerald H. Miller, is the former chief administrative officer of the State Department of Management and Budget. Defendant, The Department of Trea-

sury, is a State governmental unit whose jurisdiction includes the construction and maintenance of State-controlled highways, streets and passageways. Defendant, John P. Woodford, is the former chief administrative officer for The Department of Treasury. The individual Defendants held their respective positions during all times that are relevant to the issues which are presently pending before this Court.

Jurisdiction in this matter is based on the Fourteenth Amendment to the United States Constitution; 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 2000d, 42 U.S.C. § 2000e *et seq.* and arises under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

Plaintiffs filed this action, seeking declaratory and injunctive relief against the Defendants. In their Complaint, they allege that their constitutional and civil rights had been violated by the enactment and enforcement of P.A.1980, No. 428, M.C.L.A. § 450.771 *et seq.* [P.A. 428]. At the same time, Plaintiffs filed a Motion for Preliminary Injunction, in which they asked this Court to enjoin the State from enforcing P.A. 428.

Thereafter, the Defendants filed an Answer to the Complaint, asserting, in part, that P.A. 428 is consistent with the Constitution and laws of the United States. After a hearing on Plaintiffs' Motion for Preliminary Injunction, the Court issued an Order Denying Plaintiffs' Motion for Preliminary Injunction because of their failure to satisfy the minimum standards of *Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir.1977).

This matter is now before the Court on the Motions for Summary Judgment, which have been filed by the respective parties to this action.

The Michigan Legislature enacted P.A. 428, which became effective on January 13, 1981. This Act represented the culmination of approximately nine years of effort by the legislative and executive branches of the State Government to increase the participation of minority and woman owned businesses in the procurement of goods, services and construction by the State. Section 450.772(2) of P.A. 428 establishes a procurement policy which sets interim and [175] expenditures goals of each department for minority and woman owned business as follows:

> (a) For minority owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 116% of the actual expenditures for 1982-83, and this level of effort at not less than 7% of expenditures shall be maintained thereafter.
>
> (b) For woman owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 200% of the actual expenditures for 1982-83, the goal for 1984-85 shall be 140% of the expenditures for 1983-84, and this level of effort at not less than 5% of expenditures shall be maintained thereafter.

A minority is defined as "a person who is black, hispanic, oriental, eskimo, or an American Indian who is not less than 1/4 quantum Indian blood as certified by the person's tribal association and verified by the Indian affairs

commission," M.C.L.A. § 450.771(e). A minority owned business is one in which more than fifty percent of the voting shares or interest in the business is owned, controlled or operated by a defined minority and more than fifty percent of the net profit or loss of the business accrues to those shareholders, M.C.L.A. § 450.771(f). A woman owned business is similarly defined, see M.C.L.A. § 450.771(j). Awards can only be made to qualified minority and woman owned businesses. Thus, all minority and woman owned businesses, to whom contracts are awarded, must "comply with the same requirements expected of other bidders, including but not limited to, being adequately bonded." M.C.L.A. § 450.772(5).

Plaintiffs argue that P.A. 428 violates the Equal Protection Clause of the Fourteenth Amendment, as well as 42 U.S.C. §§ 1981 and 1983. Plaintiffs do not contend that they have been (1) subjected to discrimination in the award of any particular contract or (2) denied the opportunity to bid on any contract because of P.A. 428. Rather, they assert that the Act is unconstitutional on its face. In their view, P.A. 428 creates an unlawful "set aside" (based on impermissible classifications by race and sex) that cannot withstand constitutional scrutiny because (1) the State cannot demonstrate a compelling interest in establishing such classifications, and (2) even if the State can establish a compelling interest, the selected remedy is not properly tailored to accomplish that interest.

The Defendants contend that P.A. 428 is remedial legislation which is designed to remedy the present effects of past discrimination. They also assert that the Act does not create an unlawful "set aside" on the basis of race or sex because it (1) merely establishes goals and affirmative practices in the State's procurement policy and procedures, and (2) even if the Act is deemed to create a "set

aside," it is a lawful affirmative action program that does not violate the Equal Protection Clause of the Fourteenth Amendment or 42 U.S.C. §§ 1981 and 1983.

Interestingly, each party relies upon *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1979) in support of their respective positions.

In *Fullilove*, the Supreme Court examined and evaluated a constitutional challenge to the Minority Business Enterprise provision of the Public Works Employment Act of 1977 [MBE], § 106(f)(2), 42 U.S.C. § 6701 *et seq.* In a plurality decision, the Court determined that the MBE was constitutional notwithstanding its mandate that "at least 10% of [any grant for local public works projects] shall be expended for minority businesses."

In its ruling, it is clear that the *Fullilove* Court adhered to its earlier stance that "racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment," *Fullilove*, at 517, [176] 100 S.Ct. at 2794 (Marshall, J. concurring); *Regents of University of California v. Bakke*, 438 U.S. 265, 356, 98 S.Ct. 2733, 2781, 57 L.Ed.2d 750 (1978). Although the Court merely concluded that Congress had the power to implement the MBE under Section 5 of the Fourteenth Amendment and Art. 1, Section 8 of the Commerce Clause, it does not appear that the Supreme Court retreated from its earlier pronouncements that affirmative action programs are subject to "strict scrutiny," *Fullilove* 448 U.S. at 519, 100 S.Ct. at 2795 (Marshall, J., concurring). Moreover, in light of the Sixth Circuit's recent opinion in *Bratton et al. v. City of Detroit et al.*, 704 F.2d 878 (6th Cir.1983), this Court determines that the proper standard of review in the instant cause must be one of strict scrutiny.

Where the claim of racial discrimination is made by the white majority, strict scrutiny is more than a generic term. Its qualities are not immutable. Thus, in an affirmative action case (such as the one presented here) strict scrutiny must not be applied in a manner in which it is "strict in theory, but fatal in fact." *Regents of University of California v. Bakke*, 438 U.S. at 361-62, 98 S.Ct. at 2784; *Fullilove v. Klutznick*, 448 U.S. at 507, 100 S.Ct. at 2789, (Powell, J., concurring), 448 U.S. at 519, 100 S.Ct. at 2795 (Marshall, J., concurring).

"A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and rational policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain. . . ." *Bratton* at 886, *citing Detroit Police Officers v. Young*, 608 F.2d at 671, 697 (6th Cir.1979). Thus, this Court must examine *Fullilove* and the appropriate cases of the Sixth Circuit to determine the precise meaning of strict scrutiny within the context of legislative enactments which are alleged to favor a minority class of citizens over the dominate majority.

In *Fullilove*, Powell, J. stated that a racial classification is constitutionally prohibited "unless it is a necessary means of advancing a compelling governmental interest," 448 U.S. at 496, 100 S.Ct. at 2783. Unlike the traditional analysis, which requires that the means chosen must be absolutely necessary, he concluded that "the means selected by Congress [or a body with authority to act] need only be equitable and reasonably necessary to redress" an identified discrimination, *at* 510, 100 S.Ct. at 2791.

Justice Marshall adhered to his earlier position in *Bakke*, stating that ". . . the proper inquiry is whether racial classifications designed to further remedial purposes serves important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, at 519, 100 S.Ct. at 2795.

In *Bratton, supra*, the Sixth Circuit held that the standard of inquiry for the voluntary affirmative action plans of a public employer is whether the chosen remedial measures are reasonable in light of the significant governmental interest "in ameliorating the disabling effects of identified discrimination," at 886. Although the decision was rendered in the context of public employment, the *Bratton* Court indicated that Justice Marshall's opinion in *Fullilove* "clearly affirms the analysis generally relied upon" in the Sixth Circuit's initial affirmative action opinion in *Detroit Police Officers Association v. Young*, 608 F.2d 671, and reaffirmed in *Bratton, at* 885.

This Court is persuaded that the opinions of Justices Powell and Marshall are so closely aligned to the rule of the Sixth Circuit that this Court should not, and indeed, cannot deviate from the law of this Circuit. Thus, this Court believes that the *Bratton* standard should be applied to the instant cause.

Having determined that the law of this Circuit requires that the State must demonstrate a significant interest in ameliorating the past effects of present discrimination rather than the "compelling interest" standard which has been advanced by the Plain- [177] tiffs, this Court must examine the record to assess the nature of the interest of the State in enacting P.A. 428. Plaintiffs assert that the Act embodies a preference solely on the basis of race and sex. They contend that the only purpose of this Act is to

foster minority and woman owned businesses and, thus, it was not designed to remedy anything. Plaintiffs strongly argue that P.A. 428 was not designed to remedy the present effects of past discrimination because the findings by the State are inadequate to establish the existence of past discrimination in the multitude of areas which are covered by the Act. Moreover, they say that there have been no specific findings of unlawful discrimination against any of the preferred classes in P.A. 428.

In response, the Defendants say that the Act does not create set asides, preferences, or quotas but merely establishes "goals" and "levels of effort" which would afford a greater opportunity for minorities and women to participate in State procurement activities. Notwithstanding, they contend that even if these goals are construed to be set asides or preferences, its finding of past impairment upon, and historical discrimination against, the classes, who are identified in P.A. 428, are sufficient to justify the use of racial and ethnic criteria by the Legislature as a means of remedying the present effects of past discrimination.

This Court has been called upon to determine whether P.A. 428, as written, comports with the Equal Protection requirements of the Constitution. This Court declines to designate P.A. 428 as a "goal" or "set aside" legislation. However, it is clear that the Act does provide a procurement mechanism which must be viewed as giving deference, if not preference, to minorities and women. Thus, this Court will examine P.A. 428 in the most stringent light, and will consider it as a "set aside" enactment for the singular purpose of evaluating these Motions for Summary Judgment.

In *Fullilove*, Justice Powell articulated two require-

ments for the establishment of "permissible remedial action." "First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination (citations omitted). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination." 448 U.S. at 498, 100 S.Ct. at 2784.

Plaintiffs do not argue that the Michigan Legislature is an inappropriate authority to enact the race and sex conscious remedy which is embodied in P.A. 428. However, they do assert that the findings of the Legislature are inadequate to justify such a remedy. The degree of findings which are necessary to support a race or sex conscious remedy depends upon the body establishing such a remedy, see *Fullilove v. Klutznick, supra: regents of University of California v. Bakke, supra.*

Here, Plaintiffs contend that the Defendants failed to make specific findings of past discrimination. In support of its position, they rely upon *Central Alabama Paving, Inc. v. James*, 499 F.Supp 629 (M.D.Ala.1980).

This Court notes that in *Central Alabama Paving*, the findings were made by an administrative body. The Supreme Court has never required the same degree of specificity for a legislative determination of past racial discrimination as that required for an administrative body or the judiciary branch of government. As Justice Powell noted in *Fullilove* "[t]he degree of specificity required in findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body," *note 14 at* 515-16, 100 S.Ct. at 2794.

In *Fullilove*, the Petitioner contended that the legisla-

tive record must be treated "as the complete record of congressional decision-making" underlying its enactment of the MBE. Justice Powell indicated that such a requirement would be an unwarranted constraint upon the legislative process. Congress need not make "specific factual findings with respect to each legislative action," *at* 503, 100 S.Ct. at 2787. "Rather, [the Court] may examine the total contemporary record of congressional action deal-[178] ing with the problems of racial discrimination against minority business enterprises," *id.*

In *Bratton*, the Sixth Circuit reaffirmed the position articulated in *Young* and enumerated the type of evidence which is "necessary to justify a finding of prior overt discrimination," stating:

> Where consistent practices have resulted in a significant disparate impact among races, the discriminatory intent may be established by any evidence which logically supports the inference that state action or policies were adopted for invidious purposes. Such "logical" evidence includes the statistics of racial impact, the historical background of the decision which led to such impact, the contemporaneous statements of the members of the decision-making body, and the presence of actions from which disparate impact is foreseeable," at 888.[1]

The *Bratton* and *Young* decisions appear to reject the argument that has been advanced by the Plaintiffs. Thus,

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[1]

As noted earlier, *Bratton* was decided in the context of public employment. Nonetheless, as noted above, *Fullilove* does not mandate that a more stringent test be applied to an attack on a legislative enactment that is designed to ameliorate the present effects of past discrimination.

their reliance upon *Central Alabama Paving* appears to have been misplaced.

This Court is not faced with a Congressional finding, but with a finding of a State legislature whose elected representatives, like those of Congress, are called upon to set policy "rather than to apply settled principles of law." Its role is "representative rather than impartial," *Fullilove* 448 U.S. at 502, 100 S.Ct. at 2787. In addition, the Constitution imposes upon States a duty to eliminate the present effects of past discrimination, *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir.1979). Moreover, the Legislature need not make specific findings of past discrimination, *Valentine v. Smith*, 654 F.2d 503 (8th Cir.1981).

This Court is of the opinion that the Defendants' evidence of a prior discrimination need not exceed that level which is articulated in *Bratton*. In fact, inasmuch as the Legislature is the ultimate policy-making body of the State and the nature of the decision-making process in the legislative setting is analogous to that of Congress, it may rely upon any evidence which logically supports the inference of prior discrimination. Thus, this Court concludes that the findings which are required of the Michigan Legislature need not rise to the level of those which are required of judicial or administrative bodies.

The Court must examine the record to determine whether the Michigan Legislature's decision was based upon evidence from which it could logically infer that minorities and women were discriminated against prior to the enactment of P.A. 428.

The history of P.A. 428 reflects that, as early as 1971, the State began to recognize the problems of women and

minorities in securing more than a miniscule portion of the millions of dollars in contracts awarded annually by various agencies within the State. This recognition was reflected in an Executive Memoranda concerning House Bill No. 4394 (1971). The primary thrust of this proposed legislation was to "liberalize the bonding requirements for government construction projects" which, in turn, would increase the amount of small business participation in government contracts and procurements. It was thought that this legislation would ultimately benefit minority businesses, who would normally fall within the classification of "a small business."

House Bill 4394, which was designed to amend existing legislation would have (1) increased the exemption for bonding requirements for contractors seeking work on public buildings from $5,000 to $25,000, (2) allowed small businesses to file an acceptable letter of credit in lieu of posting a performance or payment bond, and (3) required a bond of only 25% of the total contract amount rather than 50% under existing legislation. A governmental analysis of this Bill indicated that it would benefit the State, as well as the small business [179] community. The infusion of small business into the State procurement process would increase the number of contractors who could bid on a project, which would ultimately result in an increase in competition and a sizeable savings for the State.

The concern of the State for the plight of small and minority owned businesses did not cease with the proposed legislation. In 1974, it commissioned a study by Urban Markets Unlimited [Urban Market], a Wisconsin based firm, to explore the State's procurement policies and its effects upon minorities. Urban Market's report, *A Public Procurement Inventory on Minority Vendors*, which

was issued in July 1974 contained startling revelations concerning the participation of minorities in the State's procurement of goods and services. It also disclosed certain unfounded negative attitudes toward minority contractors by those departments who had been charged with the responsibility of awarding an enormous variety of contracts.

The report initially noted the substantial increase in government purchases from 1961 to 1971. The total purchases by state, local and federal government, throughout the entire nation in 1971, exceeded 108 Billion Dollars which represented a 91% increase over a ten year span. At the time of the report, Michigan expended $437 Million annually on goods and services. These purchases ranged from construction and maintenance of highways and buildings to food products, napkins and paper. They covered all aspects of construction, industrial, commercial and service markets (Ex. 19B, p. vii).

The Report then stated that minority owned businesses, which are often described as being synonymous with small business, have demonstrated a genuine potential for substantial growth in all segments of the economy. These enterprises have expanded into "contract construction, electronic manufacturing, banking and insurance, consumable product distribution, building and grounds maintenance, metal fabricating, publishing, entertainment, food processing and cosmetics manufacturing" (Ex. 19B, p. iiii). A survey of "The Top 100" Black businesses indicated that their growth compares favorably with that of the "Fortune 500" companies. Thus, minority owned businesses represented, and continue to represent, a viable and expanding segment of the American economy.

Against this background, the Report examined the pro-

curement opportunities that were available to minority businesses in Michigan. From the outset, it appeared that the record of the State in this area was less than glowing. At the time of the Report, there were over 8,000 minority firms in the State of Michigan with gross receipts of $319 Million. Nearly 75% of these firms were located within the metropolitan Detroit area. A sampling of 1665 purchasing documents (representing expenditures of over $21 Million) revealed that only four minority firms had done business with the State. These purchases totaled a mere $155.00 or 0.0007% of $21,338,823.00 in State expenditures (Ex. 19B, p. 23). Despite this dismal performance, a majority of the State agencies who were sampled "felt [that] the State's purchasing system was equitable to all vendors" (Ex. 19B, p. 22).

The Report next focused on the procurement practices and policies of twenty-six State agencies regarding minority vendors. The most utilized method for purchasing was the Request for Quotation [RFQ] whereas the least utilized means was advertising. Vendors were solicited to bid on a project or commodity through the RFQ. Only approved vendors were permitted to bid on State contracts. Those vendors, who expressed a desire to bid on State contracts, were required to seek approval from the Purchasing Division of the Department of Management and Budget. Applications were made available by mail. This Department was charged with determining the qualification and reliability of a prospective vendor primarily on the basis of the information that was contained in the application. The approved vendors were then placed on an active bidders' list by commodity area. It is from this list that the agencies selected vendors to receive a RFQ.

[180] However, an Auditor General's report revealed that (1) several applications were neither available nor on

file and, therefore, could not be verified against the vendors who had been listed on the bidders list, and (2) many vendor applications had been lost, discarded, misfiled or sent to the State Records and Publications Center. The Auditor General also noted that the standard procedure for approving vendors had not been observed in many cases. Rather, "reliable and approved vendors [were] solicited from various sources" such as (1) the Thomas Register of American Manufacturers, (2) yellow pages of city telephone directories, (3) personal visits by vendors and their salesmen who carried credentials which had been deemed to be satisfactory by staff members, and (4) bid opening lists on bulletin boards of the Purchasing Division.

There is nothing to indicate that the selected vendors were required to provide the financial and other pertinent information which was required in the standard application. In addition, there is no indication that an evaluation of the qualifications or reliability of the approved vendors was undertaken before they were placed on the active bidders' list. The Report notes "(i)f the explanation given the Auditor General's Office . . . is appropriate, it means that the division has wide discretionary authority in approving vendors for the bidders' list. This could have important ramifications on approval of minority vendors for the bidders' list" (Ex. 19B, p. 51).

Although the Report does not attempt to articulate or identify the nature and extent of these ramifications, it does contain insightful information concerning the practices and policies of State purchase authorities toward minorities. Only three of the twenty-six agencies had any official policy toward minorities. Only five of the agencies maintained sources for minority vendors or actively sought minority vendors. Nevertheless, twenty-two of the

agencies indicated a willingness to utilize minority directories.[2] Yet, there is no indication that these agencies consulted the State's Directory of Minority Businesses[3] in order to identify minority vendors and include them on the active bidders' list under the informal procedure described in the Auditor General's Report. Urban Market also reported that the attitudes of the twenty-six agencies' purchasing agents toward minority businesses strongly demonstrated their collective unwillingness to deal with minority vendors.

Urban Market also reported that a majority of the purchasing agents within the surveyed agencies expressed negative attitudes toward minority vendors. They believed that minority vendors were (1) non-competitive, (2) lacked an established "track record," and (3) provided poor service and delivery, even though they had not had any actual experience with minority vendors. The available data in the Report does not support these perceptions. The Report concluded that there was substantial evidence to indicate that minority firms in Michigan are as competent, or in some instances, more competent than non-minority firms. A nationwide survey of private industry purchasing managers, who actually did business with minority firms, found that seventy-four percent of the purchasing agents felt that minority firms performed as well as non-minority firms, seven percent felt that minority firms performed better than non-minority firms, and only nineteen percent felt that minority firms performed worse than non-minority firms. This performance profile covered four ma-

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[2]

Two agencies expressed an unwillingness to use minority directories. The reply of the remaining two agencies is cataloged as "other response."

[3]

Three agencies did indicate that they consulted minority directories when selecting vendors to receive RFQ.

jor categories: (1) supplies and services, (2) parts and components, (3) raw materials, and (4) tools and equipment. In addition, minority firms in Michigan operate in a broad spectrum of the industrial market.

In 1974, six of the "Top 100" Black Enterprises were located in Michigan. Further, the United States Department of [181] Commerce publication "Minority Owned Businesses: 1969" indicated that there were 8,112 minority firms doing business in Michigan. Over half of those firms had the potential to supply a wide range of industrial markets.[4] "The result[s] of the 'Purchasing' survey and other private industry experience appears to dispel some of the commonly held assumptions that minority firms are incompetent, do not exist to any degree in the industrial materials supply area and are not competitive" (Ex. 19B, p. 74).

Finally, the Report made it clear that the negative attitude of State purchasing authorities toward minority vendors would cripple any steps toward achieving equity in the State's purchasing policies. "To rationalize that the lack of success in minority procurement is based upon minorities incompetency and non-responsiveness is not supported by the evidence. Continuing to do so will maintain the 'status quo' and void the State of an opportu-

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[4]

In addition to the information actually compiled by the State, there was also available statistical information compiled by the Census Bureau of the United States Department of Commerce. The Economic Census of 1977 contained statistics on the number of businesses owned by Black, Asian-Americans, American Indians, Spanish Americans and Women in Michigan, as well as the other forty-nine states. For example, the census showed 8,498 Black owned businesses in Michigan with gross receipts of $449,303,000 Dollars. In addition, the areas of such businesses were broken down into nine categories; (1) construction, (2) manufacturing, (3) transportation and public utilities, (4) wholesale trade, (5) retail trade, (6) finance, insurance and real estate, and (7) selected services.

nity to increase its competitive sources of supply and the economic development of a sizeable portion of the State's population" (Exhibit 19B, p. 75).

Based on their study, Urban Markets reported that (1) "the States purchasing practices are not equitable in the treatment of minorities," and (2) the State does not actively seek new sources of vendors and this does not comport with its stated policy to "[e]ncourage by every legitimate means, actual and vigorous competition for State business." The Report, in concluding that the State could not hope to achieve equity in its treatment of minority business unless it exhibited the "will to do business," stated that "those who have achieved success in this area all have definitive policies which include at least the following ingredients: (a) a declaration of intent to do business, (b) actively encourages and seeks business and (c) a mechanism for insuring reasonable compliance with the stated policy. It is inconceivable that the State can increase minority procurement without a policy to that effect" *id.*

The publication and dissemination of the Report spawned legislative and executive action. In June of 1975, the State Senate introduced Senate Bill 885, which was designed to establish a "set aside" program for small businesses. This Bill was followed by Senate Bill 1461 (1976) and Senate Bill 10 (1977). Each of these Bills addressed a set aside for small businesses. Although none of the Bills expressly sanctioned a set aside for minority businesses, their legislative history and analysis indicate that they were designed, in part, to address the perceived problems which faced minority businesses. Senate Bill 1461 specifically attempted to set aside contracts for "socially or economically disadvantaged persons." The Department of Commerce recommended that the proposed legislation be

amended to read: "Minority Business Enterprise means a business enterprise that is owned or controlled solely by 1 or more socially or economically disadvantaged persons. The disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause" (Ex. 19A, p. 3).

Norton L. Berman [Berman], Director of the Office of Economic Expansion, Michigan Department of Commerce, in testimony before the Senate State Affairs Committee regarding enactment of Senate Bill 1461, reported that voluntary efforts by the State were under way to assist minority firms in securing State contracts. Nonetheless, he encouraged the Legislature to enact the set aside legislation. Berman stated, in part:

> Since the beginning of our efforts to involve minorities in State procurement, [182] considerable discussion has occurred and volunteer efforts put forth to develop programs within the State Departments to involve minority businesses. We are happy to see these efforts, but remain concerned that until there is a statute mandating these efforts, there is a danger these efforts will not be ongoing. I am aware there are those who view this legislation as preferential treatment and the distortion of the competitive spirit of purchasing. I agree that this might be considered so, but unorthodox methods are needed to create opportunities for a major segment of our society that can contribute more to our economic stability. With regards to competition, what we have now in many industries is competition among the small operators and domination by a few large firms. Large businesses often can sell at a considerable lower price because of high volume sales, more efficient distribution systems and more advertising and promotion.

> Small businesses cannot equitably compete because of these disadvantages of size (Ex. 19A(26) pp. 5-6).

Berman's testimony included specific references to the efforts of other States in fostering or encouraging small and minority business participation through legislative enactment or executive order. Particular reference was made to the results in Minnesota after it had enacted legislation which was similar to Senate Bill 1461. After only one year of operation under the statute, Minnesota exceeded the legislative mandate of a 10% set aside for small and minority businesses by 24%. In addition, it added 170 new vendors to its bidders' list, of which 60 were small businesses and 110 were socially or economically disadvantaged vendors. Berman noted that Minnesota's Director of Purchasing had not perceived any problem with the program.

Senate Bill 1461 did not go without criticism. Its most notable critic was the Department of Management and Budget [DMB] which considered the Bill to be costly and abhorred the percentage goals as arbitrary and possibly unworkable. It felt that socially and economically disadvantaged firms would not be able to furnish 10% of the State's procurements. Moreover, DMB adhered to its earlier position that the State's procurement policies had been grounded on a tradition of competition and "produced honest and efficient practices." It recommended that the State need only provide assistance and encouragement to small and minority firms by providing information and technical assistance (Ex. 19A(7)). The comments of the Department reflected upon its earlier position that small and minority businesses failed to fully participate in the State's procurement because of their own incompetence and inadequacies. This attitude persisted even in the face of a comprehensive study which revealed that

such attitudes were unfounded. Neither Senate Bill 1461 nor Senate Bill 10 were adopted by the Legislature.

In the midst of this legislative action, the Governor mounted a program of his own. On July 28, 1975, he issued Executive Directive 1975-4 (Ex. 19D) which created a Task Force on Small Business Participation in State Purchasing [Task Force]. The Directive reiterated the State's policy of encouraging "full participation by all facets of the business community, large and small." Nonetheless, it recognized that despite this policy "there [was] a need to take further steps to ensure full participation in state purchasing by small businesses." In addition, it placed particular emphasis on minority businesses who have "historically had greater difficulty getting into the mainstream of our American business enterprise system."

The Task Force was directed to (1) review existing rules and regulations of state purchasing to determine "whether impediments may exist," that prevent small businesses from fully participating in State procurement, (2) review state law regarding procurement procedures and determine necessary and appropriate measures to enhance small business opportunities, and (3) consult public and private agencies, organizations and individuals. The Governor specifically directed the Department of Management [183] and Budget to cooperate with the Task Force in (1) identifying the percentage of state contracts awarded to small businesses, (2) appraise the methods used to notify prospective bidders of the availability of state contracts, (3) analyze present procedures to determine whether smaller awards would increase participation, and (4) propose modifications in procedure to accomplish the goals of the Directive.

In furtherance of its mandate, the Task Force con-

ducted two public hearings in order to obtain an input from the business community and to obtain their perceptions of State procurement policies. The attendees expressed the following views:

(a) State government appears to have a large and complex procurement structure with few unifying forces and few common policies and procedures.

(b) Procedures for dissemination of procurement information to small and minority business enterprises are inadequate.

(c) Because of their limited resources, small and minority business persons require more time between the advertising and the opening of bids in which to prepare their bid documents than that provided by current state procurement procedures.

(d) In some instances, procurement specifications appear unnecessarily narrow, i.e., specifying branded items which may be unavailable to them.

(e) State purchases and contracts, in many cases, are too large for small and minority businesses to accommodate.

(f) The State does not require contractors to solicit bids from small and minority subcontractors.

(g) Because of their limited financial resources, small and minority business enterprises require more prompt payment of invoices than the method which is provided by current state procurement procedures.

(h) The necessity of investing funds prior to the award of bids or contracts creates a hardship for small and minority business enterprises.

(i) Because of their limited resources and experience, small and minority business enterprises are frequently unable to meet state bonding and prequalification requirements.

(j) Small and minority business persons lack expertise in estimating and bidding.

Pursuant to the Directive, the Task Force issued its Final Report in March 1976, which contained numerous recommendations to accomplish the goals of the Executive Directive. Among these recommendations were provisions that each State agency (1) adopt formal plans and procedures to implement the State's small and minority business procurement policy, (2) establish goals for participation of small and minority businesses, (3) create a Small/Minority Business Procurement Council to (a) monitor the State's procurement efforts in this area, and (b) develop guidelines to streamline state procurement procedures in a manner which addresses the concerns expressed by small and minority businesses.

As a result of the Task Force's findings, the Governor issued Executive Directive 1976-4 on September 21, 1976. This Directive stated, in part, "the policy of the executive branch agencies of the State of Michigan shall be to aid, counsel, assist and protect the interests of small and minority business concerns in order to preserve free competitive enterprise and to insure that a fair proportion of the procurement of state agencies and agencies of the state be placed with small and minority business enterprises" (Ex. 19D, p. 8). To this end, the Governor estab-

lished the Small and Minority Business Procurement Council, and directed each State agency to cooperate with the Council so that the objectives of the policy might be achieved. The Governor also directed the Council to submit an annual report, which would evaluate the implementation of the small and minority business procurement policy.

In 1977, the Council issued its First Annual Report. The total State agency commitment for fiscal year 1976-77 to small [184] businesses was set at 23% while that set for minority businesses was 1%. At the end of the fiscal year, the commitment for minority businesses had been reached and the commitment for small businesses was exceeded by 30%. The Task Force noted "[t]here is little doubt that the imminence of Senate Bill Number 10 had a stimulating effect upon departments, especially during the latter part of fiscal year 1977" (p. 2). (Senate Bill 10 proposed a "set aside" for small and minority businesses).

On December 6, 1975, the Governor issued Executive Directive 1975-6 "Civil Rights Compliance in State and Federal Contracts" (Ex. 19E), and directed the Michigan Department of Civil Rights to:

(1) Establish standards and procedures for assuring non-discrimination in the provision of state programs, services and funds which are available directly or indirectly through the State of Michigan.

(2) Provide state departments, agencies and institutions with assistance in developing their internal procedures for requiring compliance with non-discrimination requirements consistent with the statewide standards and procedures.

(3) Monitor and review the procedures adopted by departments, and agencies to assure compliance with the standards established by the Directive.

(4) Review state laws that establish programs and services and report to the Governor, executive or administrative action that might be appropriate to encourage non-discriminatory applications of those programs consistent with the objectives of the Directive.

(5) Provide an annual report to the Governor with respect to compliance by state agencies with the policies established by the Directive.

On May 15, 1978, the Department of Civil Rights [MCRC] issued a Report, which expressed concern over the limited progress that had been made in implementing Executive Directive 1975-6 because of (1) the lack of availability of staff in some agencies, (2) the inexperience of personnel in dealing with civil rights matters, and (3) the intense involvement of the MCRC staff in evaluating and assisting in every review. Particular concern was expressed about some departments who, after making a commitment to comply with the Executive Directive 1975-6, "subjected the process to repeated delays resulting in little or no implementation. Two of the departments with the largest grant programs, both in terms of numbers and monetary value, raised legal questions that have severely limited implementation."

All of this information was available to the Legislature on March 15, 1979 when the House initiated House Bill 4335. The original House Bill 4335 proposed a set aside of 20% of state contracts, 13% for small businesses and 7% for minority businesses. In February 1980, the pro-

posed set aside provision for small businesses was dropped and a 5% set aside section for women was added. In its final form, the absolute set aside language was removed from the Bill. Instead, the proposed legislation provided for a gradual attainment of ultimate percentages of contracts for minority and woman owned businesses. This was to be accomplished by increasing the percentage of actual expenditures to these businesses over a four year period in the case of minorities and a five year period in the case of woman owned businesses.[5]

DMB initially expressed concern that the absolute set asides could not be attained. The gradual implementation in the final draft appears to have been addressed to these concerns. By and large, however, the [185] executive departments supported the Bill as a means of increasing the participation of women and minorities in the activities of State government. Each analysis of the Bill reiterates this theme and the reasons in favor of legislative adoption of it:

> Statistical descriptions of the extent of participation in state programs by businesses controlled by women and minorities are varied and sometimes contradictory depending on the definitions used and the sam-

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[5]

The following chart shows the gradual increase in the percentage of expenditures designated for minority and woman owned businesses.

	MINORITY		FEMALE	
	% of prior year	% of base	% of prior year	% of base
1979-80 Est.		1.0		.25
1980-81	150	1.5	150	.375
1981-82	200	3.0	200	.750
1982-83	200	6.0	200	1.5
1983-84	116	7.0	200	3.0
1984-85			140	5.0

> ples of state spending examined. These descriptions, however, all reveal that such businesses receive a disproportionately small share of state spending for construction and goods and services in relation to their proportion of the state's population. That minorities and women have been systematically denied equal opportunity in this country is sad historical fact now generally accepted and widely recognized in legislation of the past two decades. In the interests of justice as well as the social and economic health of the state, the legislature should do all that it can to ensure that businesses owned by minorities and women obtain their fair share of the state's business. (Ex. 19A(17), p. 2).

House Bill 4335 was finally adopted by the Legislature two years after its initiation and became Public Act 1980, No. 428, which took immediate effect on January 13, 1981.

Plaintiffs say that this record does not support a finding of past discrimination. In particular, they argue that the record merely sets forth "the history of the western world for the past 200 years, laws in this country that have imposed inferior status on minorities and women, the statutory scheme upheld in *Fullilove*, various exhibits discussing P.A. 428 and similar Acts proposed but not passed; and various exhibits demonstrating the low dollar percentage of state contracts obtained by minority owned businesses." Moreover, they assert that the record reveals that the lack of participation by minorities has nothing to do with discrimination but is attributable to the complexity of the procurement procedures by the State and the lack of resources available to small and minority businesses. They further contend that, in the face of this evidence, the State has attempted to "magically" transform a mere sta-

tistical disparity into a finding of past intentional discrimination.

This Court must reject Plaintiffs' contentions that the Legislature findings were unrelated to the conditions within the State. The evidence before the Legislature amounted to much more than a general assertion of past discrimination against minorities and women in this country over the "past 200 years." As the record clearly indicates, much of the evidence, which was relied upon by the Legislature prior to the adoption of P.A. 428, was specifically addressed to the plight of minority businesses within the State.

Next, Plaintiffs strenuously contend that the Legislature cannot rely on statistical evidence alone to support a finding of past discrimination, particularly where there is evidence to support a contrary result. Statistical evidence alone may, in some circumstances, demonstrate a constitutional violation, *Detroit Police Officers Assn. v. Young, supra*, 608 F.2d 671, 686.

Even though a limited survey of small and minority businesses supports the belief that the State's complex purchasing procedures contributes to minority businesses' inability to participate fully in State procurements, those perceptions do not negate the unmistakable conclusions which are drawn from the statistical evidence. The testimony of Berman before the Senate shows that the Executive Branch had taken steps to assist small and minority businesses in dealing with the complexities of State procurement prior to the introduction of Senate Bill 1461. The Office of Economic Expansion [OEE] through its Division of Minority Business Enterprise and Small Business Development [DMBE], provided assistance in "management/administrative training programs, problem

solving with governmental regulatory agencies, and financial resource development" (p. 2) prior to the enactment of P.A. 428. Moreover, while it appears that the Senate procurement policies ad- [186] versely affected small and minority businesses, the impact upon the minority business community was more severe and persistent.

A comprehensive study, *A Public Procurement Inventory of Minority Vendors*, showed that State purchasing agents harbored unfounded negative attitudes toward minority businesses which hampered efforts to increase minority participation in State procurement. The 1978 MCRC Report demonstrated that, even after Executive action to correct a "statistical" imbalance had been implemented, these attitudes had not lessened and threatened to further hamper Executive efforts in this area. Following the issuance of Executive Directive 1975-4, small business participation reached 26% of all State procurement for the 1976 fiscal year. In that same year, minority businesses obtained only 1% of all State contracts. During the same period of time, there were over 8,000 minority businesses in the State, whose activities span a wide range of goods and services and at least six of those businesses are among the Top 100 Black businesses in the country. Under these circumstances, an inference of discrimination can hardly be termed "magical."

Plaintiffs next contend that (1) the actions of the Michigan Legislature were not the same as those of Congress when it decided to adopt the MBE statute, and (2) the Michigan Legislature merely refers to the *Fullilove* decision to support its actions. The record before this Court demonstrates that the actions of the Michigan Legislature virtually paralleled that of Congress. In *Fullilove*, the Supreme Court noted that Congress first attempted to address the under-participation of minorities through § 8(a)

of the Senate Small Business Act, Public Law 85-536. Under the Act, the Small Business Administration [SBA] was permitted to assist small businesses in contracting to furnish goods and services to the Federal Government. In 1968, the President directed the SBA to develop a program to assist small businesses who were owned or controlled by "socially or economically disadvantaged [persons] to achieve a competitive position in the economy." In a 1975 Report, the House Subcommittee on SBA Oversight and Minority Enterprise expressed its disappointment in the limited effectiveness of § 8(a) of the Small Business Act. It noted that minorities received only 0.65% of Government contracts. The General Accounting Office and the United States Commission on Civil Rights also expressed dissatisfaction with the limited success of § 8(a). In addition, the Congress had a report from the Office of Minority Business Enterprise [OMBE] which concluded "that OMBE efforts were 'totally inadequate' to achieve its policy of increasing opportunities for subcontracting by minority businesses on public contracts. OMBE efforts were hampered by a glaring lack of specific objectives which each prime contractor should be required to achieve by a *'lack of enforcement provisions' and by a 'lack of any meaningful monitoring system,'* " *Fullilove* at 467, 100 S.Ct. at 2769 (emphasis added), *citing* H.R.Rep. No. 94-468, 1975.

In the present case, the State initiated a similar small business "set aside" act (Senate Bill 1461). The Senate then introduced Senate Bill 10 which included particular assistance for businesses that were owned or controlled by "socially and economically disadvantaged" persons. The definition of such persons is essentially the same as that which had been promulgated by the SBA in connection with §8(a). The initiation of these Bills in the Legislature was accompanied by Executive action. The Reports from

the MCRC, Small Business Task Force, and the Small and Minority Business Procurement Council all reached the same basic conclusions as those that were submitted by various commissions to Congress on the effectiveness of § 8(a). Each of these Reports noted that executive programs had been hampered by bureaucratic recalcitrance. One study noted that the impetus toward even limited success was caused by the imminence of set aside legislation (Senate Bill 10).

Plaintiffs seems to suggest that this Court should require the State to trace the exact legislative and executive steps which had [187] been taken by the Federal Government in *Fullilove* and hold that the State cannot rely on the experience of the Federal Government. In view of this record, Plaintiffs' position would appear to be untenable. Although the Michigan Legislature did not pass Senate Bills 1461 or 10, the State should not be required to retrace the unsuccessful path of the Federal Government because (1) the Michigan Legislature could take notice of the Federal Government's admitted failure in assisting minorities through § 8(a) of the SBA, and (2) on the basis of various reports, studies and executive actions, it was apparent that the bureaucracy's intransigence required specific enforeable legislation. The record in this case is but a microcosm of the national record before Congress when it passed the MBE.

For this reason and the reasons previously cited, this Court must reject Plaintiffs' contentions. This Court finds that there was sufficient evidence before the Legislature to make a finding of past intentional discrimination.

Having determined that the State has established its interest in ameliorating the present effects of past discrimination, this Court must now determine whether P.A. 428

is a reasonable means of achieving that end. In considering this question, the Court must examine (1) whether any group or individual is stigmatized by the implementation of the Act, and (2) whether the race and sex classifications have been reasonably drawn in light of the Act's objectives. *Bratton, supra*, at 887. A party who attacks a race or sex conscious remedy must demonstrate that it manifests a "constitutionally impermissible stigma," *Bratton, supra*, at 891. To determine whether a remedy lacks the indicia which is associated with an "impermissible stigma," Courts have looked to (1) whether the beneficiaries (minorities or women) of the remedy are qualified for the position thus granted, *Bratton, supra*, at 891; *Valentine v. Smith, supra*, at 511, (2) the actual burden shouldered by the white majority, in light of the scope of the program, *Fullilove, supra* 448 U.S. at 484, 100 S.Ct. at 2777.

The record before this Court demonstrates that P.A. 428 provides adequate safeguards to assure that those persons who are granted awards under its provisions are as qualified as their majority counterparts. In addition, the program does not force an undue burden upon the majority contractors. Section 2 Paragraph (5) of the Act, M.C.L.A. § 450.772(5) provides that "minority and woman owned businesses shall comply with the same requirements expected of other bidders including but not limited to being adequately bonded." Under these circumstances no stigma attaches to either class.

This Court must also consider the burdens that have been placed upon the white majority in connection with the implementation of P.A. 428. In Michigan, procurement exceeds over 437 million dollars per year. The ultimate percentages set aside for minority and woman owned businesses is 7% and 5% respectively. Under the Federal MBE, 10% of all contracts were set aside for mi-

norities alone. Justice Burger found that the MBE's 10% set aside resulted in a relatively light burden for non-minority firms in light of the scope of program "as compared with overall construction contracting opportunities" in the public and private sectors, *Fullilove* at 484, 100 S.Ct. at 2777.[6]

Here, too, the burden upon non-minority firms is light compared to their overall contracting opportunities. This is particularly true because the non-minority firms attack a set aside which addresses all segments of the State's procurement activities, not just the highway and building construction. The overall opportunities for the State and private sectors are enormous. Under these circumstances, it is not unreasonable for these non-minority contractors to "share the burden" of ameliorating the present [188] effects of post discrimination, *Fullilove* at 484, 100 S.Ct. at 2778.

Finally, this Court must address the reasonableness of the Act. "This test encompasses a variety of considerations which may vary given the nature of the preference plan to be considered and the circumstances surrounding its implementation," *Bratton* at 892. No one characteristic is determinative of what is constitutionally reasonable, *id.* In *Fullilove*, the Supreme Court enumerated the characteristics of the MBE which made it constitutionally permissible: (1) the program was a strictly remedial measure, (2) it functioned prospectively, (3) the plan was open only to qualified, bona fide MBE's, (4) technical assistance is provided as needed, (5) the 10% set aside may be waived if qualified, bona fide MBE's are not available, (6) there

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[6]

See note 72 at 484, 100 S.Ct. at 2778. The Commerce Department estimated that over 170 Billion Dollars was spent on construction in the United States in 1977.

was an administrative mechanism, including a complaint procedure to ensure that only bona fide MBE's are encompassed and to prevent unjust participation by those who have not suffered from prior discrimination, and (7) the program was appropriately limited in extent and duration.

Public Act 428 contains all of these characteristics. As discussed in detail earlier, the Act is strictly a remedial measure that is designed to ameliorate the present effects of past discrimination. The Act functions prospectively and it clearly requires all minority and women vendors to meet the same qualifications as their majority counterparts. Next, technical assistance is provided through the OEE. In addition, P.A. 464, M.C.L.A. § 450.781 et seq., establishes a Small Business Development Program to provide small businesses with information, managerial, and technical assistance, and to assist the Legislature in developing and strengthening small businesses within the State.

Although P.A. 428 does not contain a mechanism for an administrative waiver, it does specifically provide that if no qualified minority or woman owned businesses are available to bid upon a contract, the contract will go to a majority business, M.C.L.A. § 450.772(6). Next, pursuant to P.A. 428, administrative procedures have been promulgated by the Office of Human Resource Policy and Special Projects to implement the Act.

Among these procedures is a mechanism for "Verification of Status." All applicants, who seek to claim the status of a minority or woman owned business, must submit a verification form containing: (1) the legal, financial and operating interests of the business, and (2) an attestation to the accuracy of the information. If any contracting de-

partment has good reason to believe that a person does not meet the standard for a minority or woman owned business, it may request (1) additional information of the applicant, (2) an investigation by the Department of Civil Rights or (3) action by the Attorney General if it appears that a person has misrepresented his or her status.

These administrative procedures also contain a complaint mechanism, whereby any business or firm, which has submitted a bid and been denied a contract, "may file a complaint with the Department of Civil Rights, alleging that the denial was unfair and that the unfairness resulted from the administration of [P.A. 428]." The Procedures also include an appeals process.[7]

Finally, Section 3 of the Act, M.C.L.A. § 450.773 requires the Governor to submit a [189] semi-annual report to the Legislature which will detail the results of the State's procurement policy and the actual number and dollar volume of contracts that have been awarded to minority and woman owned businesses during the reported period.

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[7]

P.A. 428 itself requires that a person certify his or her status: A person who wishes to be certified as a minority owned or woman owned business shall complete a sworn affidavit that the person is a minority owned or woman owned business and is prepared to bid on state contracts. All ownership interests in the business shall be specifically identified in the affidavit. The affidavit shall be filed with the governor or a department designated by the governor.

The Act also provides for penalties for anyone who fradulently procures a contract: "A person who knowingly violates or conspires to violate this act, or who knowingly and fradulently procures or attempts to procure a contract with this state as a minority owned or woman owned business is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not less than $5,000.00 or both. A person who violates this act shall be barred from obtaining future contracts with the state."

Plaintiffs contend that P.A. 428 does not comport with the tenets of *Fullilove* because the remedy is improperly tailored to its objectives. Specifically, they contend that the Act does not (1) insure that only those businesses which have suffered from prior discrimination will receive the benefit of the set aside, or (2) have a termination point. Plaintiffs argue that *Fullilove* makes it clear that these characteristics are essential to a finding of constitutionality.

A careful reading of *Fullilove* discloses that Plaintiffs' interpretation is in error. It is true that Chief Justice Burger noted that the administrative mechanism of the MBE contained provisions "to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination," at 482, 100 S.Ct. at 2776. This passage cites pages 471-472, 100 S.Ct. at 2771 of the opinion, which referred to regulations that specifically define "minority" and to a complaint procedure which is almost identical to that in the Michigan Administrative Procedures.[8] Contrary to the argument of the Plaintiffs, the *Fullilove* Court did not enunciate a standard which requires that persons who seek the benefits of the MBE must show that they were actually the victims of past discrimination.

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[8]

The sections referred to are in the Appendix of Chief Justice Burger's opinion at 494-495, 100 S.Ct. at 2782-83, and reads as follows:

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

"a) Negro—an individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent

It is also true that Justice Burger found it significant that the MBE was of limited duration, but the full passage of the notation reveals the true significance of that provision:

> The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to re-assessment and re-evaluation by Congress prior to any extension or re-enactment. Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

At 489, 100 S.Ct. at 2780.

Nowhere in the Supreme Court's opinion is there a statement which requires that a remedial act be of limited duration. The concern expressed by the Chief Justice was

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thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North American and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: education institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA Technical Bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office. "If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

that Congress, by limiting the duration of the Act, would have an opportunity to assess its progress. If the Act had achieved its objectives, then Congress would not need [190] take any further action. If the Act did not achieve its intended objective, then Congress could reenact it. The essence of the durational limitation was to provide for "re-assessment and re-evaluation" of the Act.

Although P.A. 428 does not contain a termination date, it does require the Governor to give semi-annual reports to the Legislature on the progress, if any, that has been made toward achieving its objectives. In this way, the Legislature can reassess and re-evaluate the Act every six months. Because of this safeguard, the absence of a termination date does not render the Act unconstitutional. P.A. 428 fully comports with the spirit and the language of *Fullilove*.

For all the foregoing reasons, this Court finds that P.A. 428 is constitutionally permissible and is not violative of the Equal Protection Clause of the Fourteenth Amendment. The Court also determines that the Act does not violate 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 2000d, or 42 U.S.C. § 2000e. see *Bratton, supra*. The Court finds that Plaintiffs' attack upon P.A. 428 is without merit. Thus, the Court denies Plaintiffs' Motion for Summary Judgment and grants Defendants' Motion for Summary Judgment.

SO ORDERED.

* * *

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*]

FILED—AUG 24, 1984
JOHN P. HEHMAN, CLERK

No. 83-1630

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN ROAD BUILDERS ASSOCIATION, ET AL., **Plaintiffs-Appellants,** **v.** **WILLIAM G. MILLIKEN, ET AL.,** **Defendants-Appellees.**	**ORDER**

BEFORE: ENGEL, MERRITT, and KENNEDY, Circuit Judges

This matter is before the Court upon consideration of the appellees' motion to dismiss the appeal for lack of jurisdiction. The appellants have failed to file a response to the motion. However, the appellants' reply brief filed in the appeal addresses the jurisdictional problem.

Upon review of the record it appears that the district court did not decide the claims against the Michigan Department of Transportation. Since not all the claims have been decided by the district court and the court did not

grant a Rule 54(b), Federal Rules of Civil Procedure, this Court does not have jurisdiction to review the August 16, 1983 opinion and the August 12, 1983 judgment of the district court. *Oak Construction v. Huron Cement Company*, 475 F.2d 1220; *Hardin v. M/V Ben Candies*, 549 F.2d 395 (5th Cir. 1977); *Estate of Burks v. Ross*, 418 F.2d 913 (6th Cir. 1969).

It is therefore ORDERED that the motion to dismiss be granted and the appeal be and hereby is dismissed.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/
Clerk

FILED—MAY 3, 1988
JOHN P. HEHMAN, CLERK

No. 86-1239

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al,

Plaintiffs-Appellants,

v

WILLIAM G. MILLIKEN, et al,

Defendants-Appellees.

NOTICE OF APPEAL

Pursuant to U.S. Supreme Court Rule 10, notice is hereby given that Defendants-Appellees (the State of

Michigan) appeal to the United States Supreme Court from the November 25, 1987 final judgment in this action, and upon the denial of the petition for rehearing by order dated February 23, 1988. Appeal is taken pursuant to 28 USC § 1254(2).

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Brent E. Simmons
Assistant Attorney General
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-6434

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PUBLIC ACTS 1980-No. 428
[No. 428]

AN ACT to provide for the designation of state procurements of goods, services, and construction for minority owned and woman owned businesses; to provide powers and duties of the governor; to prescribe powers and duties of certain state departments and agencies; and to provide penalties.

The People of the State of Michigan enact:

450.771 Definitions [M.S.A. 3.540(51)]

Sec. 1. As used in this act:

(a) "Controlled" means exercising the power to make policy decisions in a business.

(b) "Department" means a principal department of the executive branch of the state government.

(c) "Expenditures" means payments and contracts for goods, services, and construction which may be acquired competitively and are not regulated by separate authority, and, where the department acts as the sole or primary contracting officer and has selective discretion as to the supplier, vendor, or contractor.

(d) "Joint venture" means an agreement that combines 2 or more businesses for specified purposes involving 1 or more minority owned or woman owned businesses and 1 or more businesses other than a minority owned or woman owned business.

(e) "Minority" means a person who is black, hispanic, oriental, eskimo, or an American Indian who is not less

than 1/4 quantum Indian blood as certified by the persons' tribal association and verified by the Indian affairs commission.

(f) "Minority owned business" means a business enterprise of which more than 50% of the voting shares or interest in the business is owned, controlled, and operated by individuals who are members of a minority and with respect to which more than 50% of the net profit or loss attributable to the business accrues to shareholders who are members of a minority.

(g) "Operated" means the activity of being involved in the day to day management of a business.

(h) "Person" means an individual, sole proprietorship, partnership, association, or corporation.

(i) "Subcontract" means an agreement to share a prime contract between a prime contractor, who is not a minority owned business or a woman owned business, and a minority owned or woman owned business.

(j) "Woman owned business" means a business of which more than 50% of the voting shares or interest in the business is owned, controlled, and operated by women and with respect to which more than 50% of the net profit or loss attributable to the business accrues to the women shareholders.

450.772 Construction, goods, and services procurement policy; minority owned and woman owned businesses; provisions; program changes; portion of prime contract reflecting minority owned or woman owned business participation; bidder requirements; contract award. [M.S.A. 3.540(52)]

Sec. 2 (1) The construction, goods, and services procurement policy for each department shall provide for the following percentage of expenditures to be awarded to minority owned and woman owned businesses by each department except as provided in subsection (6):

(a) For minority owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 116% of the actual expenditures for 1982-83, and this level of effort at not less than 7% of expenditures shall be maintained thereafter.

(b) For woman owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 200% of the actual expenditures for 1982-83, the goal for 1984-85 shall be 140% of the expenditures for 1983-84, and this level of effort at not less than 5% of expenditures shall be maintained thereafter.

(2) If the first year goals are not achieved, the governor shall recommend to the legislature changes in programs to assist minority and woman owned businesses.

(3) Each department, to assist in meeting the construction, goods, and services procurement expenditures percentages set forth in subsection (1), shall include provisions for the accommodation of subcontracts and joint ventures. The provisions shall be established by the governor and shall require a bidder to indicate the extent of minority owned or woman owned business participation.

(4) Only the portion of a prime contract that reflects minority owned or woman owned business participation shall be considered in meeting the requirements of subsection (1).

(5) Minority owned or woman owned businesses shall comply with the same requirements expected of other bidders including, but not limited to, being adequately bonded.

(6) If the bidders for any contract do not include a qualified minority owned and operated or woman owned and operated business, the contract shall be awarded to the lowest bidder otherwise qualified to perform the contract.

450.773 Establishing procurement policy for meeting projected goals; report; staff. [M.S.A. 3.540(53)]

Sec. 3 (1) The governor shall establish a procurement policy for each executive department to implement and establish the method of meeting the projected goals established in section 2.

(2) The governor shall submit a report to the legislature every 3 months during the first year of operation and every 6 months during succeeding years. The report shall detail the results of the governor's procurement policy including the specific contracts awarded by each department and the type of business engaged in by the person awarded the contract.

(3) Appropriate staff to implement the governor's policy shall be provided by the department of management and budget.

450.774 Certification as minority owned or woman owned business; affidavit; filing. [M.S.A. 3.540(54)]

Sec. 4. A person who wishes to be certified as a minority owned or woman owned business shall complete a sworn affidavit that the person is a minority owned or woman owned business and is prepared to bid on state contracts. All ownership interests in the business shall be specifically identified in the affidavit. The affidavit shall be filed with the governor or a department designated by the governor.

450.775 Violating or conspiring to violate act; fraudulent procurement of contract; felony; penalty; barring violator from obtaining future contracts. [M.S.A. 3.540(55)]

Sec. 5. A person who knowingly violates or conspires to violate this act, or who knowingly and fradulently procures or attempts to procure a contract with this state as a minority owned or woman owned business is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not less than $5,000.00, or both. A person who violates this act shall be barred from obtaining future contracts with the state.

450.776 Minority owned or woman owned business as prime contractor. [M.S.A. 3.540(56)]

Sec. 6. If a minority owned or woman owned business receives a contract, the minority owned or woman owned business shall be the prime contractor through its duration.

This act is ordered to take immediate effect.

Approved January 13, 1981.

FILED
JUN 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1866

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM G. MILLIKEN, et al.,
Appellants

v.

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO AFFIRM

Butzel Long Gust Klein & Van Zile
By: JOHN B. WEAVER*
LEONARD M. NIEHOFF
1650 First National Building
Detroit, Michigan 48226
(313) 963-8142
Attorneys for Appellees
**Counsel of Record*

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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OBJECT OF THE MOTION

Public Act 428, Mich. Comp. Laws §450.771 et seq., the Minority Owned and Woman Owned Businesses Act (hereinafter P.A. 428), "sets aside" a specified percentage of the expenditures of each principal department of the executive branch of the state of Michigan for allocation to minority-owned and woman-owned businesses. Appellees Michigan Road Builders Association, Inc., et al, challenged the validity of this statute, contending that P.A. 428 unlawfully discriminates in violation of the Fourteenth Amendment to the United States Constitution, as well as various federal statutes including 42 U.S.C. §§ 1981 and 1983. The district court for the Eastern District of Michigan, Southern Division, issued an opinion upholding the constitutionality of P.A. 428 and entered judgment in favor of Appellants. The district court opinion is reported at 654 F. Supp. 3 (E.D. Mich. 1986). The United States Court of Appeals for the Sixth Circuit held that P.A. 428 offends constitutional guarantees of equal protection and reversed the judgment of the district court. The Court of Appeals opinion is reported at 834 F.2d 583 (6th Cir. 1987).

Appellees bring this Motion to Affirm pursuant to United States Supreme Court Rules 16.1(c) and (d). Appellees move this Court to affirm the decision of the Sixth Circuit because the questions presented are insubstantial and/or because the decision of that Court is obviously correct and warrants no further review.

STATEMENT OF FACTS AND COUNTERSTATEMENT OF THE CASE

On its face, P.A. 428 employs classifications based upon race, ethnic origin, and sex; on its face, P.A. 428 discriminates in the awarding of state contracts based upon those suspect classifications. As this Court has repeatedly held, such classifications are "inherently suspect," *Parham v. Hughes*, 451 U.S. 347, 351 (1979), and presumptively invalid:

> Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an *extraordinary justification*.
>
> * * *
>
> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination . . . [A]ny state law overtly or covertly designed to [grant a preference based upon sex] would require an *exceedingly persuasive justification* to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272-273 (1978).[1]

The record of this case fails to establish that there is any compelling, extraordinary, or exceedingly persuasive justification for the facially suspect classifications created by P.A. 428. Indeed, quite to the contrary, the record establishes that P.A. 428 emerged as the unfortunate result of legislative whim and momentum.

A. Counterstatement of Statutory Background

Contrary to the State's contention at page 3 of its Jurisdictional Statement, the recognition of underutilization of minority-

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[1]Emphasis added throughout unless otherwise indicated.

owned and women-owned businesses in state contracting was done wholely in the context of a concern that small businesses generally were not participating in the state's contracting and purchasing processes. Indeed, the House Bill that resulted in the challenged statute was introduced on March 15, 1979 as the "Michigan small and minority business procurement act." A substitute Bill was subsequently introduced which dealt only with minority and women-owned businesses.

P.A. 428 thus emerged as a device to obtain a greater representation of minority-owned and women-owned businesses in the state contracting arena. As Justice Powell noted in *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978):

> If the petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Nowhere is the State's true motive better illustrated than in its argument concerning the propriety of including Blacks, Hispanics, Orientals, Eskimos, and American Indians as members of the preferred class. The State admitted that it did not know how many Black, Hispanic, Oriental, Eskimo, American Indian, or women-owned businesses existed in Michigan. The State further admitted that it did not know how many, if any, Black, Hispanic, Oriental, Eskimo, American Indian, or women-owned businesses had ever requested bid documents from the State or had been awarded contracts by the State. *See* Court of Appeals opinion, p. 594-595, n.14. It is submitted that where a state does not know whether a particular class of businesses exist, or whether any class member has sought to do business with the state, or whether any class member has ever done business with the state, a statute granting a preference to such class can only have as its object a

desire to assure a certain percentage of the class as participants in the state's program. This the Constitution forbids.

B. Response to Appellants' Statement of Statutory Background

In their Jurisdictional Statement, Appellants have labored to create retrospectively a legislative history that does not exist. The documents and other evidence relied upon by Appellants do not establish that the State enacted P.A. 428 to remedy identified discrimination.

1. The Urban Markets Study

Appellants place considerable weight upon the report of a 1974 state-commissioned study by Urban Markets Unlimited, Inc. (hereinafter Urban Markets). See Court of Appeals opinion, p. 593. This study, however, contains no finding or suggestion of intentional racial discrimination. See Court of Appeals opinion, p. 593. Appellants stress that the report includes the statement that "state procurement practices are not equitable in the treatment of minority vendors," but examination of the context of that statement reveals that there is no mention of discrimination and that this conclusion is based upon a very undisciplined analysis of statistics. Indeed, the State Department of Management and Budget "found the methodology of [the Urban Markets report] faulty, producing 'unreliable' results." Record Exhibit 19(C), p. 6. The Urban Markets data[2] was later relied upon by the State because it was "the only current available data in this area — despite the [statement by the Department of Management and Budget] that it might not be fully representative." *Id.* p. 6. The Sixth Circuit similarly concluded that certain propositions upon which the analysis of the report was based were so questionable as

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[2]The Urban Markets Report itself stated: "There were a number of cases where data was inadequate or unavailable for the purpose of this study. Some of the data needed was scarce or non-existent, particularly, on the extent of purchases from minorities." Urban Markets report, Record Exhibit 19(B), p. x.

to "seriously undermine" the validity of the conclusions reached by that report.[3] Court of Appeals opinion, p. 593, n. 10.

2. Executive Action

The documents reflecting the executive action leading up to the enactment of P.A. 428 also fail to establish the existence of any identified discrimination. Indeed, those documents primarily make sweeping statements concerning societal disparities or address themselves to the problems of small businesses generally rather than of minority businesses in particular. The history of P.A. 428 is clear in this regard:

- July 28, 1975. The Governor issues an Executive Directive regarding Small Business Activities, discussing only general societal disparities: "Minority businesses have *historically* had greater difficulty getting into the mainstream of our American business enterprise system." The Governor establishes a task force designed to benefit *all* small businesses. Record Exhibit 19(D).

- March, 1976. The Task Force on Small Business Participation issues its Final Report. The report identifies problems and makes recommendations regarding minority businesses and *all small businesses in general.* The document contains no discussion of intentional discrimination. The document also states that "Measurement of existing minority business participation in state procurement is extremely difficult at this time. No mechanism exists for identifying those firms which now participate in state procurement by ownership characteristics." Record Exhibit 19(C).

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[3]The report is also interesting in that it only recommends implementation of the following: (1) a declaration of a policy defining the state's position on minority procurement; (2) communication of purchasing information to minority vendors; (3) dissemination of information on minority vendors to state buyers (4) establishment of a minority state purchasing organization; (5) collection of data on minority procurement; and (6) a set of goals and objectives. Urban Markets report, Record Exhibit 19(B), pp. 75-81. These "goals," "objectives," and "recommendations" hardly indicate that a mandatory, discriminatory set-aside quota is necessary to achieve the same ends.

- September 21, 1976. The Governor issues an Executive Directive establishing the Small and Minority Business Procurement Council. The Directive discusses problems common to all *small and minority* businesses. The Directive further requests the Council to define "minority." Record Exhibits 19(D), 46(B).

- January, 1978. The Small and Minority Business Council issues its First Annual Report. The Report addresses problems common to all small businesses and includes no discussion of intentional discrimination based upon race or sex. Record Exhibit 19(D).

This record of executive action is void of any documented, identified discrimination against minorities or women. *See* Court of Appeals opinion, pp. 592-593.

That the State's actions were aimed at a perceived underrepresentation of small and minority owned businesses rather than to remedy identified discrimination is clear from the statement at page 4 of the State's Jurisdictional Statement that: "None of these measures corrected the *under representation* of minority and women-owned businesses in state contracting."

3. Legislative History

When asked to disclose the information that the Michigan legislature relied on in making its "findings," Appellants provided a litany of historical and societal disparities:

> As a general matter, books, treatises, which pertain to the history of racial and ethnic minorities and females in western culture, including the history of the Western world for the past 2000 years, reflect and document discrimination based upon race, sex, and ethnic origin, which constitute the historical factual record *from which the legislature identified the problem which 1980 PA 428 was designed to remedy.*

See Court of Appeals Opinion, p. 594. Appellants referred to ancient laws that have imposed inferior status on minorities and women:

> Included in the historical record of which the legislature (upon information and belief) had knowledge, are the various laws and statutes of the United States and the State of Michigan which imposed inferior legal, social, and economic status upon racial minorities, females, and ethnic minorities. Specific reference is made to the Constitution of the United States, which imposed such status upon women, native Americans and racial minorities. Reference is also made to the several statutes of the State of Michigan which impose inferior status upon females in terms of their ability to acquire, maintain and dispose of property.

The State also referred to the enactment of remedial laws, including the statutory scheme upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980):

> Reference is also made to the legislature's knowledge or the conditions which gave rise to the passage in more recent times or federal and state laws and statutes designed to remedy the effects of past discrimination, including but not limited to the Thirteenth, Fourteenth, Fifteenth, and Twenty-First Amendments to the United States Constitution, 42 U.S.C. 1981-1986, 42 U.S.C. 2000a-2000h, the ten percent set aside contained in the Public Works Employment Act of 1977, 91 Stat. 116, which statute was upheld in the case of *Fullilove v. Klutznick*, 61 L.Ed. 2d 902.

Further, Appellants directed Appellees to a variety of proposed small business set-aside statutes that were not adopted. The text and history of the proposed legislation makes eminently clear that the perceived underrepresentation of minority businesses in state contracting was the result of factors *other than discrimination* — problems related to management, financing, market development, and Michigan's "sluggish economy." *See* Court of Appeals opinion, p. 591.

In sum, the record of this case is void of any findings of intentional discrimination that would justify the extraordinary response of a mandatory set-aside statute.

ARGUMENT

Appellants contend that the Court of Appeals committed three errors that warrant the review of this Court.

There is no error; there is no basis for review.

I.

APPELLANTS' CHALLENGE TO THE STANDARD APPLIED BY THE COURT OF APPEALS IS WITHOUT MERIT.

Appellants first argue that the Sixth Circuit erred by holding that the Michigan legislature "was required to '*prove* that the State of Michigan invidiously discriminated against racial and ethnic minorities in awarding state contracts.' " Court of Appeals opinion, p. 594 (emphasis added in Appellants' Jurisdictional Statement). Appellants place great emphasis upon the word "prove" and insist that this language creates a standard not reflected in the opinions of this Court.

This argument is completely unpersuasive. As an initial observation, Appellants certainly cannot contest the established principle that they bear the burden of proving that a compelling justification exists for this facially discriminatory statute. See ***Parham, Feeney,*** and ***Bakke, supra.*** The burden of proof is clearly allocated.

Moreover, Appellants' argument is based upon a plain mischaracterization of the opinion of the Sixth Circuit. In their Jurisdictional Statement, appellants protest as follows:

> The Sixth Circuit . . . errs in holding that Michigan was required to "prove" it had discriminated before enacting Public Act 428. Moreover, the Sixth Circuit also errs in applying judicial standards of review to a legislative determination . . .
>
> The State need only have "sufficient evidence to justify the conclusion that there has been prior discrimination," or "a firm basis for believing that remedial action is required."

Jurisdictional Statement, p. 15. The opinion of the Court of Appeals makes clear, however, what the Court meant when it used the term "prove":

> [T]his Court must decide whether the Michigan legislature, based upon the evidentiary factual record before it, "had a *firm basis* for believing that such action was required based upon prior discrimination" by the state itself. . .
>
> An examination of the evidence assertedly relied upon by the defendants in this action as support for their contention that the Michigan legislature had a *firm basis* for concluding that the state had engaged in discrimination in awarding contracts for goods and services clearly indicates that *Michigan had not developed material evidence to support a conclusion* that it had a compelling interest in adopting the racial and ethnic distinctions at issue in the case at bar. The defendants have relied upon certain conclusory historical resumes of unrelated legislative enactments and proposed enactments, executive reports, and a state funded private study conducted in 1974. This documentation is not reflective of discriminatory action by the State of Michigan.

Court of Appeals opinion, p. 590. The Court of Appeals concluded that the Michigan legislature "had little, if any, probative evidence before it that would warrant a finding that the State of Michigan had discriminated against [minority businesses] in awarding state contracts for the purchase of goods and services." Court of Appeals opinion, p. 594. With regard to the preference according to women-owned businesses, the Court of Appeals found the evidence non-existent. Court of Appeals opinion, p. 595.

The Court of Appeals did not impose any severe or prohibited burden of proof upon Appellants in this case. Indeed, it appears that the Court only placed upon Appellants precisely the burden of proof that Appellants advocate in their Jurisdictional Statement. The Court of Appeals concluded, however, that the purported "proof" offered by the state was, at best, not probative, and at worst, non-existent. The Court of Appeals' conclusion was clearly correct.

II.

THE COURT OF APPEALS EXERCISED PROPER REVIEW OF THE DISTRICT COURT DECISION.

Appellants' second claim of error is also spurious. In its Jurisdictional Statement, at pp. 17-18, Appellants essentially argue that the Sixth Circuit erred by failing to apply the "clearly erroneous" standard embodied in F.R.Civ.P. 52 to the factual findings of the district court.

The Rule 52 standard did not apply to the Court of Appeals review of the district court decision because the district court reached its findings predicated upon a misunderstanding of the governing rule of law. In its opinion upholding the constitutionality of PA 428, the District Court applied the "reasonableness" standard that was established in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983). In *Bratton*, the court ruled that "the standard to be applied . . . [is] strict scrutiny." The *Bratton* court held, however, that cases involving claims of discrimination against members of the white majority "move against the grain" and, in such a context, strict scrutiny takes on a very different meaning. In short, *Bratton* reformulated the "strict scrutiny" standard in this context into a "rational basis" or "reasonableness" standard. The District Court in this case adopted the *Bratton* standard. See District Court opinion, p. 176.

In *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), a panel of the Sixth Circuit relied upon *Bratton* and adopted the "reasonableness" standard announced there. On May 19, 1986, this Court reversed the decision of the Sixth Circuit in *Wygant* and expressly rejected the *Bratton* standard. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) at 279 (Powell: "[The reasonableness] standard has no support in the decisions of this Court") and 283 (O'Connor: "[the 'reasonableness' test] is plainly incorrect under any of the standards articulated by this Court"). Based on *Wygant*, the Court of Appeals in the instant case disapproved the district court's application of the *Bratton* standard.

It is well settled that Rule 52 does not apply to findings based upon a misunderstanding of the governing rule of law. See, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1983) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may in fact be so-called mixed findings of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law"); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974); and *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194, n.9 (1962). Having found that the District Court erred in adopting the *Bratton* standard, the Court of Appeals correctly applied the *Wygant* standard and adjudged the case thereunder.

Appellants' second assignment of error raises no question worthy of this Court's analysis.

III.

APPELLANTS' ARGUMENT THAT THE COURT OF APPEALS ERRED IN CONSIDERING THE ABSENCE OF FINDINGS OF DISCRIMINATION AGAINST THE DISTINCT FAVORED MINORITIES IS WITHOUT MERIT.

Finally, Appellants contend that the Sixth Circuit erred in holding that separate findings of prior, purposeful discrimination against distinct racial and ethnic groups are required.

As an initial observation, it should be noted that Appellants have again mischaracterized the opinion of the Court of Appeals. The "holding" that Appellants challenge as one of their three principle assignments of error is relegated to a footnote in the opinion of the Court of Appeals[4] and does not constitute a necessary logical step in that Court's analysis.

Further, the Court of Appeals could hardly be faulted for noting that the state has admitted that they had no information as to how many minorities in each of the favored minority groups actually bid for or were awarded state contracts. Appellants had the burden of establishing that the legislature had made sufficient findings of prior discrimination in the award of state contracts to warrant a racially predicated statute favoring anyone "who is black, Hispanic, Oriental, Eskimo, or an American Indian . . ." It is certainly relevant, in determining whether Appellants met their burden, to consider the fact that the state did not even know how many businesses existed that were owned by the favored minority groups.[5] As this Court held in *Fullilove v. Klutznick*, 448 U.S. 448, 497-498 (1980):

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[4]Court of Appeals opinion, p. 594-595, n. 14.

[5]Compare *Wygant*, 476 U.S. at 284 n. 13: "There is no explanation of why the Board chose to favor these particular minorities . . . Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups."

> [This] Court has never approved race-conscious remedies *absent* judicial, administrative, or legislative *findings of constitutional or statutory violations* . . .

Without data as to the existence or participation of the preferred classes it was simply impossible for the State to have made findings of constitutional or statutory violations.

IV.

THIS CASE AND THE *CROSON* CASE PRESENT DISSIMILAR ISSUES

Appellants argue that the instant case presents similar issues to those raised by *City of Richmond v. J.A. Croson Company,* No. 87-998, on appeal to this Court from the Court of Appeals for the Fourth Circuit. Although there are some superficial similarities between the two cases, the fundamental issues they present differ.

In *Croson,* the City Council of Richmond adopted a "Minority Business Utilization Plan" requiring contractors on city construction projects to subcontract at least thirty percent of the dollar value of the contract to minority-owned business enterprises unless the city waives the requirement.

In the instant case, majority contractors are precluded by the State from even submitting bids on State contracts. The State determines which projects it believes are appropriate for minority contractors and restricts bidding to minority contractors.

The Richmond ordinance in *Croson* requires majority contractors to "play ball" with minority sub-contractors; the Michigan statute forbids majority contractors from even "suiting-up."

This distinction between requiring all to participate versus excluding some from participation sets this case apart from *Croson.*

Also, the Richmond ordinance was adopted after a five-hour City Council meeting was conducted, during which the Council entertained a debate concerning the presence of invidious discrimination in contracting in Richmond. The question squarely presented by *Croson* is whether the testimony concerning conditions in Richmond elicited in the course of that debate suffices to warrant a finding of prior discrimination in the awarding of public contracts.

In the instant case, the State relied solely upon "evidence" of historical, societal discrimination occurring in the course of human civilization. The "proofs" offered by the State here simply

cannot suffice to justify a discriminatory statute; if they do, then there is no limitation whatsoever upon the adoption of such laws. Any community that qualifies as part of "the history of the Western world for the past 2000 years" (which is, of course, *any* community) also qualifies to adopt a discriminatory set-aside statute. This Court warned against such reasoning in *Wygant:*

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. *In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.*

Wygant, 476 U.S. at 276.

The divergence of the questions presented in *Croson* and those presented in the instant case indicates that each should be separately determined.

CONCLUSION

Appellants have raised no substantial question that would warrant this Court's review and have presented no meritorious challenge to the decision of the Court of Appeals.

This Court should therefore grant Appellee's Motion to Affirm.

Respectfully submitted,
BUTZEL LONG GUST KLEIN
& VAN ZILE
By: John B. Weaver*
Leonard M. Niehoff
1650 First National Building
Detroit, Michigan 48226
(313) 963-8142

Attorneys for Appellees

**Counsel of Record*

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(3)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM G. MILLIKEN, et al.,

Appellants,

v.

MICHIGAN ROAD BUILDERS ASSOCIATION INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. ("MBELDEF") AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

ANTHONY W. ROBINSON*
President
FRANKLIN M. LEE
Chief Counsel
MBELDEF
Suite 200
300 "I" Street, N.E.
Washington, D.C. 20002
(202) 543-0040

IRWIN B. SCHWARTZ
919 Third Avenue
45th Floor
New York, New York
10022
(212) 735-3842

Counsel of Record for the Amicus Curiae

35pp

No. 87-1860

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

William G. Milliken, et al.,

Appellants,

v.

Michigan Road Builders Association Inc., et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Pursuant to Supreme Court Rule 36.1, Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") respectfully moves for

leave to file the attached brief amicus curiae in this case. Although counsel for appellants and appellees orally consented to the proposed brief's filing, neither provided written consent in the time allowed for filing of the brief.

The Sixth Circuit held a minority business opportunity program enacted by the State of Michigan to be violative of the Fourteenth Amendment to the Constitution. In rejecting Michigan's compelling interest in remedying discrimination through state procurement policies, the Sixth Circuit ignored important governmental purposes served by this program. The opinion has significant implications for federal court review of state and local

government affirmative action programs.

Many of MBELDEF's membership of over 800 minority-owned businesses have benefited from federal, state, and local minority business opportunity programs. Additionally, because MBELDEF provides legal guidance to state and local governments in the adoption of these programs it has a strong interest in their constitutionality.

MBELDEF believes that its perspective may assist the Court in its determination of whether to grant plenary review of the important issues raised by this case.

Respectfully submitted,

ANTHONY W. ROBINSON

MBELDEF, Inc.
Suite 200
300 "I" Street, N.E.
Washington, D.C. 20002
(202) 543-0040

Counsel of Record

June 9, 1988

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INTEREST OF THE AMICUS CURIAE

Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote minority business opportunity programs. MBELDEF is comprised of over 800 minority businesses nationwide, many of which, in their efforts to become successful commercial enterprises, have benefited from federal, state, and local minority business opportunity programs. Additionally, MBELDEF has provided numerous state and local governments with legal guidance in the adoption of such programs

and has participated in significant litigation concerning these programs.[1] MBELDEF therefore has a significant interest in the Court's plenary review of the substantial constitutional issues presented by the invalidation of Michigan's minority business opportunity program.

STATEMENT

The State of Michigan has long recognized the difficulties of minority-owned and women-owned businesses

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[1] MBELDEF has appeared recently as intervenor-appellee before the Sixth Circuit in Tennessee Asphalt Co. v. Farris, No. 87-5588 (6th Cir. argued Mar. 31, 1988), and as amicus curiae in City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988) (probable jurisdiction noted), and Associated Gen. Contractors, Inc. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing en banc pending).

in securing procurement and construction contracts awarded by various state agencies. Michigan Road Builders Ass'n v. Milliken, 571 F. Supp. 173, 178 (E.D. Mich. 1983), rev'd, 834 F.2d 583 (6th Cir. 1987). In 1971, a state-sponsored study revealed that most of Michigan's twenty-six agencies had no official policy for procurement from minority-owned businesses. Id. at 180. In response, Michigan attempted to induce minority-owned business participation in state contracting opportunities by easing some bonding requirements. See id. at 178-79. Nevertheless, in 1976, "minority businesses obtained only 1% of all State contracts." Id. at 186.

After repeated unsuccessful efforts to increase minority-owned busi-

ness participation in state expenditures, in 1980 Michigan enacted a minority business opportunity bill, Public Act 428, Mich. Comp. Laws Ann. §§ 450.771-450.776 (West Supp. 1988). This Act requires gradual attainment of seven percent participation by minority-owned business enterprises ("MBEs") and five percent participation by women-owned business enterprises ("WBEs").

Appellees subsequently filed suit in United States District Court for the Eastern District of Michigan claiming violations of the Fourteenth Amendment's equal protection clause and their civil rights under 42 U.S.C. §§ 1981, 1983, 2000d, 2000e. The district court squarely rejected these claims and granted appellants' motion

for summary judgment. Milliken, 571 F. Supp. at 190. A divided Sixth Circuit[2] reversed and held that Public Act 428 violated the Fourteenth Amendment. Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 595 (6th Cir. 1987).

The Sixth Circuit reasoned that proof of state discrimination is a necessary predicate to the remedial use of racial or gender classifications. Id. at 589, 595. Contrary to the district court's express findings, the Sixth Circuit found that the "Michigan legislature had little, if any, probative evidence before it that

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[2] Judge Lively dissented. Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 595-99 (6th Cir. 1987).

would warrant a finding that the State of Michigan had discriminated against MBEs in awarding state contracts . . . ." Id. at 594. On that basis, the Sixth Circuit reversed the district court and remanded for entry of judgment.

SUMMARY OF ARGUMENT

The Sixth Circuit would deprive state and local governments from using minority business opportunity programs to redress the effects of discrimination. In striking down Michigan's Public Act 428, the Sixth Circuit disregarded the important and successful role that these programs play in governmental remedial efforts. Because Public Act 428 is a valid exercise of state authority to meet a

compelling interest the Court should note probable jurisdiction to review the Sixth Circuit's holding otherwise.

Furthermore, the Sixth Circuit's opinion sets an unprecedented and unworkable standard of review for affirmative action programs. Citing Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Sixth Circuit reversed the district court, holding that on the legislative record alone, Michigan made no predicate finding that it had previously discriminated against the Act's beneficiaries. This defective review is without basis in the Court's decisions.

The Court's recent note of probable jurisdiction in City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988), is no bar to review of the

Sixth Circuit's decision. Indeed, Milliken would provide the Court with facts to resolve substantial federal questions in reviewing racial and gender classifications enacted by states and municipalities. Given the diverse application of Wygant, the Court should also note probable jurisdiction in Milliken to provide better guidance to lower courts for review of state and local affirmative action programs.

ARGUMENT

I.

THE SIXTH CIRCUIT DISREGARDED SIGNIFICANT AND COMPELLING GOVERNMENTAL INTERESTS SERVED BY PROGRAMS DESIGNED TO INTEGRATE MBEs AND WBEs INTO THE PUBLIC SECTOR MARKET

It is uncontroverted that the combined effects of past and present, private and public discrimination have denied government contract awards to MBEs. At the national level, empirical tests indicate that discrimination has continued to injure MBEs.[3] Although approximately fifteen percent of the nation's population are minorities, only five percent of the busi-

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[3] See Bates, Minority Business Set-Asides: Theory and Practice, 1 United States Commission On Civil Rights, Selected Affirmative Action Topics in Employment and Business Set-Asides 142, 147 (1985).

nesses are minority-owned.[4] Additionally, MBEs are less profitable, more highly leveraged, and much more likely to be undercapitalized.[5] Moreover,

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[4] See Minority Business Enterprise Legal Defense and Education Fund, Minority Business Enterprises: Programs of State and Local Governments, Academy for State and Local Government 2 (Jan. 1988) (a copy of the report has been lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties).

[5] In 1944, Gunnar Myrdal observed:

> The Negro businessman, furthermore encounters greater difficulties [than whites] in securing credit. This is particularly due to the marginal position of negro business. It is also partly due to prejudiced opinions among whites concerning the business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

G. Myrdal, An American Dilemma 309 (1944).

minority entrepreneurs still earn significantly less than white-male entrepreneurs. Bates, supra note 3, at 149-50. But for the effects of discrimination, it is highly unlikely that free competitive market outcomes would so consistently disfavor minority vendors as compared to others.[6]

Furthermore, because much of the discrimination against MBEs is localized, city and state governments have a particularly strong interest, if not an obligation, in enacting remedial

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[6] Indeed, this Court has recognized the pervasive employment discrimination in the construction industry. "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979).

programs. For example, a 1974 Michigan-sponsored study "disclosed certain unfounded negative attitudes towards minority contractors by those [state] departments . . . charged with the responsibility of awarding an enormous variety of contracts," Milliken, 571 F. Supp. at 179, even though the officials "had not had any actual experience with minority vendors." Id. at 180. The study concluded that absent formal state action the "negative attitude of State purchasing authorities toward minority vendors would cripple any steps toward achieving equity in the State's purchasing policies." Id. at 181.

Federal programs directed at alleviating the disparity in contracting opportunities have taken a variety

of forms. Section 8(a) of the Small Business Act of 1953 as amended, 15 U.S.C. § 637 (1982), directs federal contract awards to small businesses owned by disadvantaged persons. Fullilove v. Klutznick, 448 U.S. 448, 463-64 (1980) (plurality opinion). The Surface Transportation Assistance Act of 1982 ("STAA"), Pub. L. No. 97-424, 96 Stat. 2098 (codified at 23 U.S.C. § 104 (1983)) and the Public Works Employment Act of 1977 ("PWEA"), Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701 (1982)), require, subject to certain waivers, that a percentage of appropriated funds be expended with firms owned by socially and economically disadvantaged individuals.

State and local minority business opportunity programs are often modeled after these long-standing federal efforts. See, e.g., N.J. Stat. Ann. §§ 52:32-17, 52:32-30 (West 1986 & Supp. 1988); Wis. Stat. Ann. §§ 16.75(3), 16.87(2), 84.075 (West 1986, 1957 & Supp. 1985). Michigan's Public Act 428 requires that state agencies' contracts with MBEs and WBEs meet percentage goals of each agency's entire annual expenditures. Milliken, 834 F.2d at 584 & n.2. After a four-year start-up period, Public Act 428 requires at least seven percent MBE participation and five percent WBE participation in state expenditures. Id. at 584.

Similar minority business opportunity programs, when measured in

terms of the number of contracts awarded and jobs created, the benefits to program participants and the overall growth in the number of MBEs, have proven effective.[7] These programs

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[7] See, e.g., Senate Committee on Small Business, Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program (1987); R. Suggs, Recent Changes in Black-Owned Businesses, Joint Center for Political Studies 12-13 (1986) (employment by black-owned heavy construction contractors rose 122.5% and receipts increased 223.7% from 1977 to 1982 attributed, in part, to PWEA); Betts and Giles, Dole Advocates Greater Business Opportunities, Foresees Minority Entrepreneurs Becoming Integral Part of the Transportation Industry, Minority Business Today, July 1986, at 17-18 (Minority Business Development Agency, U.S. Department of Commerce) (disadvantaged business enterprises participation more than tripled from 9,450 contract awards worth $1.03 billion three years prior to STAA's passage to 32,500 awards worth $3.26 billion three years after its passage); Federal Highway Administration, U.S. Department of Transportation, An Assessment of Program Impacts of the Disadvantaged Business Enterprise (DBE)

(Footnote continued)

have aided in the creation and expansion of thousands of MBEs in such

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(Footnote 7 continued from previous page)

Requirement in the Federal-Aid Highway Construction Program 70 (Draft Report, March 1986) (a copy is attached at tab A to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties) (most states experienced a doubling or tripling of disadvantaged business enterprise firms certified for highway construction work from 1983 to 1984); Minority Business Opportunity Program FY 87 Annual Report 1, 6 (a copy is attached at tab B in the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties) (Massachusetts procurement from minority-owned firms more than doubled from 1985 to 1987, with minority-owned vendor participation increasing from 368 firms in fiscal year 1984 to 813 firms in fiscal year 1987 and in 1987 state spending with minority-owned firms constituted 10.4% of discretionary services purchased and 9.4% of all discretionary construction work purchased); Executive

(Footnote continued)

fields as wholesaling, general construction, business services, and large scale manufacturing. In Michigan, MBE and WBE participation in state contracting has increased from $8.6 million in 1982 to $41.5 million in 1985.[6]

Michigan's minority business opportunity program is intended to

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(Footnote 7 continued from previous page)
Summary: 1986 Office of Contract Compliance Annual Report (Mar. 31, 1987) (a copy is attached at tab C to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties) (minority-owned business participation exceeded 36% of all Atlanta City contracts).

[6] Michigan Equal Employment and Business Opportunity Council, Status Report 27 (July 1986) (report to Governor and Legislature) (a copy is lodged with the Clerk of the Court and sent to the parties).

redress discriminatory barriers which have impaired opportunities for minorities and women in obtaining government contracts. The Sixth Circuit's decision ignores significant and compelling governmental purposes served by minority business opportunity programs. The important and necessary goals of Public Act 428 and Michigan's fully documented compelling interests mandate plenary review of the Sixth Circuit's decision.

II.

MILLIKEN UNDULY RESTRICTS STATE EFFORTS TO REMEDY DISCRIMINATION

A. Courts Are Not Restricted To the Legislative Record In Reviewing State Affirmative Action Plans

Michigan should be able to "legislate without compiling the kind of

'record' appropriate with respect to judicial or administrative proceedings."[9] Fullilove, 448 U.S. at 478 (plurality opinion); see also Perez v. United States, 402 U.S. 146, 156-57 (1971). Legislators can properly rely on information and expertise acquired in considering and enacting earlier

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[9] As Justice Powell noted in Fullilove, "the creation of national rules for the governance of society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding." 448 U.S. at 502 (Powell, J., concurring). This observation must be equally true when a state creates rules for the governance of its citizens. See Craig v. Boren, 429 U.S. 190, 234 (Rehnquist, J., dissenting) ("Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies . . . .").

legislation.[10] Fullilove, 448 U.S. at 503 (Powell, J., concurring). Similarly, in evaluating Public Act 428, the district court should not be restricted to only the Michigan Legislature's factual record.

Furthermore, the Sixth Circuit's approach is inconsistent with the Court's opinions which require review of all the evidence, not just the

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[10] Moreover, in at least one recent case, the Court has noted that a local government is even "entitled to rely on the experiences" of other local governments. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986). (a city need not "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

legislative record.[11] In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Court held that the local government must present a "strong basis in evidence" to support its decision to enact an affirmative action program utilizing racial classifications. Id. at 277 (plurality opinion). The Sixth Circuit, however, misunderstood Wygant to further require that the "evidence" must be found solely in the "evidentiary fac-

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[11] See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266-68 (1977) (requiring courts, in equal protection cases, to review all "circumstantial and direct evidence . . . as may be available"); see also City of Richmond v. United States, 422 U.S. 358, 373-75 (1975) (requiring the lower court in a Voting Rights Act case to review all data, not only that existing prior to the legislative action).

tual record" created by the legislature. Milliken, 834 F.2d at 590 (citing J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1360 (4th Cir. 1987), jur. noted, 108 S. Ct. 1010 (1988)) (emphasis added). This amounts to an impermissible judicial imposition of formal fact-finding on the Michigan Legislature.

The Sixth Circuit's approach is devastating to all programs designed to aid MBEs. Requisite legislative factual records would significantly strain many states and localities, which typically operate on a smaller and less formal scale than Congress. See, e.g., May v. Cooperman, 572 F. Supp. 1561, 1564 (D.N.J. 1983) (noting that the New Jersey legislature does not maintain records of hearings and

debates), aff'd, 780 F.2d 240 (3d Cir. 1985). The resulting Pandora's box is of such magnitude that many local governmental actions would be unsupportable absent detailed fact-finding.

B. State and Local Affirmative Action Does Not Require Governmental Mea Culpa

The Sixth Circuit also erred in requiring that Michigan make "a finding . . . that it has in the past discriminated against those classes it now favors." Milliken, 834 F.2d at 589. This requirement has no basis in law and is inconsistent with Fullilove and Wygant.

In Fullilove the Court held the Public Works Employment Act's minority business opportunity program to be constitutional as a legitimate effort

to remove "barriers to competitive access which had their roots in . . . discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." Fullilove, 448 U.S. at 478 (plurality opinion) (emphasis added). Indeed, in Fullilove, there was no evidence that the federal government itself had engaged in racial discrimination in its disbursement of federal contracting funds. Id. at 528 (Stewart, J., dissenting).

Nor does Wygant impose any requirement that a state find itself guilty of previous discrimination before passing affirmative action legislation. In Wygant, the Court held as unconstitutional an affirmative action plan that ignored senior-

ity in requiring lay off of others before minorities. Wygant, 476 U.S. at 279-84 (plurality opinion). At most, Wygant requires that governments have "sufficient evidence to justify the conclusion that there has been prior discrimination," id. at 277 (plurality opinion) (emphasis added) or "a firm basis for believing that remedial action is required." Id. at 286 (O'Connor, J., concurring).[12]

The trial court properly found that the Michigan legislature had a sufficient basis to believe that reme-

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[12] Indeed, Justice O'Connor carefully explained that specific contemporaneous findings of discrimination are not necessary because that requirement would inhibit state and local governments from voluntarily meeting their civil rights obligations. Wygant, 476 U.S. at 289-91 (O'Connor, J., concurring).

dial action was necessary to correct past and present discrimination. Milliken, 571 F. Supp. at 187. Contrary to the Sixth Circuit's decision, Michigan's compelling interest was therefore demonstrated. The Sixth Circuit's further requirement that Michigan contemporaneously find that it had discriminated against minorities is unsupportable and should be reviewed.[13]

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[13] Furthermore, even if Wygant required that a State find itself guilty of discrimination, the Michigan program passes muster. The State presented evidence that it may have indeed discriminated against MBEs and WBEs. See Milliken, 571 F. Supp. at 178-85. Nevertheless, the Sixth Circuit erroneously disregarded this strong evidence in reversing. See Milliken, 834 F.2d at 590 n.7.

C. The Sixth Circuit Ignored the Proper Standard of Review and Misapplied the Burden of Proof

In fact, the Sixth Circuit simply substituted its own view of the evidence without establishing that the lower court's findings were clearly erroneous.[14] The district court found that "there was sufficient evidence before the Legislature to make a finding of past intentional discrimina-

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[14] "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). Moreover, if factual findings of a district court are inadequate a court of appeals should not find fact on its own, but rather should remand for further fact finding. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

tion." Milliken, 571 F. Supp. at 187. This finding of intentional discrimination is a finding of fact which should not have been disturbed by the Sixth Circuit unless it is clearly erroneous. See Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

Moreover, when the district court finds a firm basis for believing that remedial action was necessary, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative action program." Wygant, 476 U.S. at 277-78 (plurality opinion). Nevertheless, the Sixth Circuit placed the burden of proof squarely on appellants. See 834 F.2d at 590. Thus, in reworking the district court's analysis, the Sixth Circuit erred in fail-

ing to shift the burden of proof to the appellees.

III.

THIS CASE COMPLEMENTS THE COURT'S CONSIDERATION OF CITY OF RICHMOND v. J.A. CROSON CO.

This Court has noted probable jurisdiction in City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988), in which the Fourth Circuit ruled that a City of Richmond affirmative action program, similar in many respects to Public Act 428, was unconstitutional. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1362 (4th Cir. 1987), jur. noted, 108 S. Ct. 1010 (1988). The Fourth Circuit construed Wygant to require Richmond to find that it had discriminated against favored groups as a predicate

to the constitutionality of its affirmative action program. Croson, 822 F.2d at 1358.

Although both cases involve the similar core issues, Milliken raises substantial federal questions not presented by Croson.[15] First, the Michigan case concerns the constitutionality of a state-enacted program

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[15] This Court has ordered consecutive arguments in cases which presented complementary issues in order to clarify the law and give better guidance to lower courts and governmental bodies. For example, in Brown v. Board of Education, 345 U.S. 972 (1953) this Court ordered five sets of parties to argue their similar constitutional issues together; see also Miranda v. Arizona, 384 U.S. 436 (1966) (resolving four separate cases at once in order to give lower courts and police agencies greater guidance). This procedure has allowed this Court to resolve and clarify important questions that could only be partially answered by deciding any one of the cases by itself.

as opposed to a municipal ordinance. In Associated General Contactors, Inc. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing en banc pending), another case concerning the constitutionality of a MBE and WBE opportunity program, the Ninth Circuit distinguished between city and state authority to enact legislation using racial classifications. Id. at 929-30. Thus, the Court should resolve whether Michigan's legislation, in addition to Richmond's ordinance, is constitutional under the Fourteenth Amendment.

Additionally, Croson concerned a program designed to aid only MBEs. Croson, 822 F.2d at 1356. Michigan's program assists both MBEs and WBEs. Because gender-based governmental

preferences may receive less stringent judicial review than those based on race, see Personnel Adm'r v. Feeney, 442 U.S. 256, 272-73 (1979), Michigan's program requires analysis not implicated in Croson.[16] The bundled affirmative action goals of Public Act 428, aimed at both racial and gender discrimination, should lead this Court to consider the Michigan program.

Finally, in Croson, the City of Richmond adopted its ordinance after a five-hour public hearing. Croson, 822 F.2d at 1358. Michigan, however, adopted its program after ten years of

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[16] Indeed, in Associated General Contractors, this difference in scrutiny led the Ninth Circuit to invalidate the MBE preference but uphold preferences for WBEs. 813 F.2d at 944.

efforts to address the difficulties faced by MBEs and WBEs in winning government contracts. Milliken, 571 F. Supp. at 178-185. This contrast between factual records may aid the Court in defining a standard of review for affirmative action efforts.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

ANTHONY W. ROBINSON
FRANKLIN M. LEE

MBELDEF, Inc.
Suite 200
300 "I" Street, N.E.
Washington, D.C. 20002
(202) 543-0040

IRWIN B. SCHWARTZ

919 Third Avenue
45th Floor
New York, New York
10022
(212) 735-3842

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